No. 481

SEP 18 1963

JOHN D. DAVIS, CLERK

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 13756.

VIKING THEATRE CORPORATION,

Appellant,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

JOINT APPENDIX.

Volume IV (Pages 1399a to 1896a).

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(4052)

TWENTY-FIFTH DAY

• • •

(4056)

JAY WREN, recalled.

CROSS-EXAMINATION (Continued)

By Mr. Nizer:

Q. Mr. Wren, we have been over the various pictures on which you gave blackboard demonstrations or otherwise testified to in connection with these so-called comparisons.

Now, is there any doubt in your mind that if you were to apply the same kind of calculations to the pictures that you were awarded, where there were opposing bids, on that kind of a calculation that you made the opposing bid would have paid a larger film rental than the Viking did?

Is there any doubt in your mind about that?

A. It might have. Some of them might have.

Q. Well, take even the foremost picture that you were awarded, NOT AS A STRANGER, that is, the six-million dollar blockbuster, which was the most successful picture the Viking ever played during the period of the suit.

(4057)

You know, of course, that there was an opposing offer by the Trans-Lux for that picture before you won it. You know that, don't you?

A. No—I do now, yes, sir.

Q. Yes. Is it necessary for me to go through the kind of calculation that you made, or will you concede that if you applied the same kind of a calculation to the Trans-Lux offer against your theatre, the Viking, namely, to assume that it would have done the same business you did in your larger theatre, at the Trans-Lux, the Trans-Lux would have

paid a larger film rental on your kind of calculation than you did?

A. Well, if I saw the bids I would be able to tell you, sir.

Q. Well, I will give it to you.

• • •

Q. (Continuing) That is the Trans-Lux bid, if that will help you answer the question.

A. This one I wouldn't agree to, sir, because he put up no guarantee.

(4058)

Q. Not "because," you wouldn't agree to it?

A. No, sir.

• • •

Q. We will go to the blackboard and see if you will not agree that on the kind of a calculation you made the Trans-Lux should have gotten NOT AS A STRANGER.

Have you all the papers you want before you, so that we can do this a little faster?

A. What is that, 90 per cent over $2750 house expense?

Q. Here, we will take it just the way you did it, NOT AS AS A STRANGER. The Viking bid—incidentally, the Viking has 1017 seats.

A. Yes, sir.

Q. And the Trans-Lux, of course, is smaller?

A. Yes, sir.

Q. How large is the Trans-Lux?

A. Either 490 or 499.

Q. Well, let us take 500 for our purposes, all right?

(4059)

A. Yes, sir.

Q. Now, you understand, I am not agreeing with all this, I am just taking your kind of calculation and testing it out on a picture that you won. Do you understand what I am doing?

A. Yes, sir.

Q. All right, now, you played that 12 weeks and your gross was how much?

A. $166,012.

Q. Let us keep it at $166,000 approximately if that is all right. And your film rental?

A. $95,500. You are keeping it in round figures, right?

Q. Yes, sir.

Now, I will take the Trans-Lux just the way you did it, on the same bid; that is, the bid for NOT AS A STRANGER, of the smaller theatre.

Now, the highest that the Trans-Lux grossed in a week was on TO CATCH A THIEF, a Paramount picture, $19,398. I am going to do just what you did, I will take the highest gross. Do you remember you took $34,000?

A. Yes, sir.

Q. Is that all right?

A. Yes, sir.

Q. All right. I will take your first week, $19,398.

(4060)

And the next highest was also on CATCH A THIEF, $16,190.

So I will not take higher than it ever did in its own career.

A. Yes, sir.

Q. That is the way you did.

A. Right, sir.

Q. After that I will do just what you did. I will take the Viking's—have you got them in front of you?

A. $18,734.

Q. Right.

A. $16,342.

$14,348.

$11,136.

$10,148.

$8,545.

Q. Right?

A. $7,978.

$8,435.

$5,965.

$5,203.

Q. And that is the total, $142,423. You can check it while you are sitting there, or your counsel can check it.

(4061)

And the film rental on that you come to, $98,000—let me put them together. One hundred sixty-six, the Trans-Lux would have had one hundred forty-two. I will make it round figures. And the film rental, instead of $95,000 would have come to $98,000.

Will you accept that now, that had you made that kind of a calculation the way you did it, the Trans-Lux would have had a higher film rental?

A. Except he didn't give a guarantee.

Q. How would the guarantee come into this?

A. A $65,000 guarantee as opposed to no guarantee on this one.

Q. All right. After you have the two bids, one has a guarantee and one hasn't, and you look at the actual performance and apply the bid to that performance this would have been the result?

A. Yes, sir.

Q. So that according to your kind of technique of making these comparisons the Trans-Lux would have paid a higher film rental had United Artists given NOT AS A STRANGER to the Trans-Lux?

A. Yes, sir.

Q. Than you would have paid, right?

A. Yes, sir.

(4062)

Q. And do you claim that in giving you the picture instead of Trans-Lux United Artists was conspiring in your

favor instead of giving it to Trans-Lux, on the kind of computation that you have made, sir; you don't claim that, do you?

A. No, sir, because of the guarantee.

Q. All right.

Now, will you, without making calculations, concede that the World Theatre, which has how many seats, sir?

A. 378, I understand.

Q. (Continuing) Also put in a bid, and if I made the same kind of a calculation that you have been doing, that the World Theatre would have paid a larger film rental than the Viking Theatre ultimately paid?

A. Terms probably, right, yes, sir.

Q. Yes.

Now, again to save time, if you took other pictures that were awarded to you, where there was a bid by an opposing theatre, the Trans-Lux, let us say THE GLASS SLIPPER. Will you accept, subject to check, so I do not have to go through it, that the film rental that would have been paid by Trans-Lux on THE GLASS SLIPPER on its bid, according to your kind of computation, which we, of course, disagree with—that if you took your computation the Trans-Lux, that 500-seat theatre, would have paid a larger film rental than

(4063)

you did on THE GLASS SLIPPER; I will give you the exact figures, $14,036, instead of $11,403, which you paid.

A. Did the Trans-Lux guarantee, sir? If they did, they should have had the picture.

Q. Forgetting for this purpose, Mr. Wren. Whatever the bids were they were. I am going by the calculation backwards, as you have done.

A. Yes, sir.

Q. I am going to the performance.

A. Yes, sir.

Q. Forget what the terms were. We are testing them out in the crucible of subsequent performance, plus the way you did it, which was to assume the larger theatre's box-office receipts; in this case the Viking is the larger theatre, right?

A. Yes, sir.

Q. If the Trans-Lux, which has half the seats of the Viking, did what you did with the Randolph, took the larger boxoffice receipts, and assumed that it would have done as much, it would have paid a larger film rental than the Viking, on that assumption.

A. On that assumption only.

Q. That is right.

Mr. Sawyer: I think you gave a wrong figure, Mr. Nizer.

(4064)

Mr. Nizer: What?

Mr. Sawyer: We paid $17,646.

Mr. Nizer: No, I am talking about after advertising deductions. You paid—

Mr. Sawyer: $17,646.

Mr. Nizer: $17,385. But then I took the advertising off. On both sides, you see.

However, with or without advertising theirs would have been higher, before deduction of advertising or after deduction of advertising, so we do not have to go into it.

By Mr. Nizer:

Q. And would you concede without my going through the computation that where the World Theatre made a bid on THE PRODIGAL, which was a picture awarded to the Viking, the World Theatre made a bid, and if you did the same kind of calculation the World Theatre's bid would

have paid a larger film rental to Loew's than the Viking. Again on your basis of calculation.

A. But only on the basis of the calculation. Not unless you put the guarantee into the crucible, which you have to do at the time the bids are evaluated.

Q. Yes, but I say—now I am not going to go into whether it is an extra week, or a percentage, or a guarantee, but if

(4065)

you made the calculation after the event, if you applied the exact terms of the bid, without a guarantee, to the Viking gross the World would have paid a larger film rental on that assumption, right?

A. Yes, sir.

Q. All right. Now I just want to ask you a few more—well, one more. I do not know whether I gave you an illustration of the Studio Theatre and BIGGER THAN LIFE which is the Twentieth Century-Fox picture, where there would be the same result; would you accept that subject to check?

A. Yes, sir.

Q. All right. Now I want to ask you this: You have suggested in your testimony, Mr. Wren, that there is an advantage to an exhibitor in negotiating rather than bidding for pictures; is that correct?

A. Yes, sir.

Q. You take that position?

A. Yes, sir.

(4066)

Q. And you say this was an advantage that you did not have at the Viking Theatre sufficiently, is that right?

A. Plain negotiating, right, sir.

Q. Now, how many of the pictures that the Viking played during the period of this lawsuit did the Viking obtain by negotiation as distinguished from bid?

A. Well, the problem presents itself now is whether it is competitive negotiation or out and out negotiation similar to the type that the other exhibitors enjoyed.

Q. Well, without going into refinements, so that we won't get bogged down in refined definitions, you know the difference in your mind between negotiating for a picture or bidding for a picture against others?

A. That's right.

Q. Now, how many of the pictures that you played at the Viking Theatre during the entire period of the suit did you obtain by negotiation as against bidding?

A. 10 or 12, by competitive negotiations.

Q. And how many without competitive negotiations? By negotiation but not by bidding.

A. I would say 12, sir.

Mr. Nizer: May I have the answer to Interrogatory 11, and also the question.

(4067)

By Mr. Nizer:

Q. Isn't it a fact that 24 out of the 35 pictures or 36, if you count a reissue, that 24 of the 35 or 36 pictures that you played at the Viking were obtained by you by negotiation as distinguished from bid? Isn't that a fact?

A. No, I don't think it is, sir. I would like it explained to me.

Q. All right. Is this your signature and oath on this document which is an answer to interrogatories? This is a photostat. I think you can make it out.

A. It looks like the "E" in "Wren," yes, sir.

Q. Do you want to see the original? If that is a little faded—

A. No, that is all right.

Q. Is that all right?

A. Yes, sir.

Q. You swore to that?

A. Yes, sir.

Q. Now I will read to you the following question—withdrawn.

You prepared these answers with your attorney at the time in answer to these interrogatories; you worked with him as you have told us, have you not? That is why you signed this?

(4068)

A. Our former counsel.

Q. Yes.

A. Yes, sir.

Q. You swore to them.

Now, you were asked the following question:

List every motion picture which the Viking Theatre Corporation licensed by negotiation—rather than by bidding—and as to each state whether the negotiation followed the rejection of bids.

Your answer to that question, here it is at page 11. You started off:

STUDENT PRINCE.

Count them up, please. This is your answer.

STUDENT PRINCE.

BETRAYED.

BRIGADOON.

ATHENA.

HIT THE DECK.

GLASS SLIPPER.

A. Pardon me just a moment.

Right, sir.

Q. THE PRODIGAL.

Mr. Sawyer: Now, the next motion picture is objected to as not being—

(4069)

Mr. Nizer: I know, I will take it out.

By Mr. Nizer:

Q. The next picture, TONIGHT'S THE NIGHT, you negotiated for but it isn't a defendants' picture, it is Allied Artists, isn't it?

A. Yes, sir.

Q. So that even though you properly listed it as a picture you negotiated, it wasn't negotiated from a defendant company.

A. No, sir.

Q. So we will take it out, correct?

A. Right, sir.

Q. All right, eliminate that.

THE WIZARD OF OZ.

Mr. Sawyer: A reissue.

Mr. Nizer: I know, but it is negotiated.

Mr. Sawyer: He said except for reissues, when he answered, so we will take that out.

Mr. Nizer: No, I didn't except reissues, nor did he.

Mr. Sawyer: Well, he did.

By Mr. Nizer:

Q. Just leave it for a second. If you want to take it out it doesn't matter, one more or less. Let's just take your

(4070)

answer first.

THE SECOND GREATEST SEX.

ALL THAT HEAVEN ALLOWS.

Do you have these, Mr. Wren, or am I going too fast?

A. I have got it.

Q. I am reading your sworn answer now.

A. Right, sir. Go ahead.

Q. ALL THAT HEAVEN ALLOWS.

THERE'S ALWAYS TOMORROW.
NEVER SAY GOODBYE.
ON THE THRESHOLD OF SPACE.
COMMANCHE.
A KISS BEFORE DYING.
REBEL IN TOWN.
THE MOON IS BLUE.
HIGH NOON.
RUN FOR THE SUN.
BANDIDO.
QUEEN OF BABYLON.
ABDULLAH'S HAREM.
ATTACK.

And here in parentheses, I will come back to that. You said "After rejection of written offers."

(4071)

This is the one you answered the second part of the question. After a rejection of a bid you negotiated for it, right?

YOU CAN'T RUN AWAY FROM IT.

Here again, "After rejection of the Viking offer."

A. That is after the period, is it not, YOU CAN'T RUN AWAY FROM IT?

Q. I don't think so. Is it?

A. Certainly.

Q. It was awarded during the period.

A. All right, sir.

Q. So under His Honor's ruling we are counting that. Now that is 25, and without TONIGHT'S THE NIGHT, 24, correct?

A. Yes, sir.

Mr. Sawyer: You have double features counted.

Mr. Nizer: Yes, pictures. There is one double feature there.

Mr. Sawyer: You count double features as a show.

The Witness: Two.

Mr. Sawyer: Two double features.

Mr. Nizer: All right.

(4072)

The Witness: MOON IS BLUE and HIGH NOON.

Mr. Nizer: Please wait. Will you just let me finish?

Mr. Sawyer: Are you going to read the next one?

Mr. Nizer: I don't think it is necessary but—

Mr. Sawyer: I request that he read the rest of the answer to the interrogatory, Your Honor, the remainder of the answer.

Mr. Nizer: To save time I will read it. I don't think it bears on this subject but we will—

Mr. Sawyer: Can you read it without any comment as to its bearing? I think it bears on the subject.

Mr. Nizer: The terms on the negotiated offers on the pictures mentioned in answer to Interrogatory 10—which is a prior interrogatory so I will not continue to read it. You may in redirect, if you wish. I am referring—

Mr. Sawyer: Your Honor, I would like to read it or have Mr. Nizer read the rest of the answer to interrogatory 11.

Mr. Nizer: All right, I will, just to save time:

(4073)

—are indicated in that answer.

By Mr. Nizer:

Q. You were referring to another interrogatory?

A. Yes, sir.

Q. The terms for the STUDENT PRINCE, BETRAYED, BRIGADOON, ATHENA, HIT THE DECK, THE GLASS SLIPPER and PRODIGAL are reflected in the written offers for those pictures which plaintiff was required to submit and the license agreements relating to those pictures which are available for defendants' inspection and copying. With regard to all of the aforenamed and other Loew's pictures, it is represented and agreed by Loew's that the Viking would be treated the same way as every other first-run exhibitor in Philadelphia, particularly respecting payments of advertising specials also by the distributor.

Now, Your Honor, I have read it, althoug'. I haven't read—I will read the last:

With respect to the picture YOU CAN'T RUN AWAY FROM IT, the Viking submitted a written offer on October 17, 1956, which was rejected and on October 18, 1956, H. E. Weiner, of Columbia, submitted a counter-offer in writing which became the basis for the license agreement. The offers and agreements are available for

(4074)

defendants' inspection and copying.

I have read it to avoid dispute and contentiousness but I move to strike out self-characterizations about matters that have nothing to do with the negotiation of pictures which I have read, Your Honor, with respect to what he was required to do on something. This is simply a claim.

Mr. Sawyer: I will agree to the striking, Your Honor, with regard to "All the aforementioned Loew's pictures it was represented . . ." the point being the preceding paragraph—

Mr. Nizer: All right, let's strike that out.

• • •

(4075)

Q. Mr. Wren, let's have no ambiguity about this. When you answer the question, which I will read again:

> List every motion picture which the Viking Theatre Corporation licensed by negotiation rather than by bidding.

You listed 24 without Allied Artists, which is not a defendants' picture.

A. Yes, sir.

Q. Was that a direct answer to the number of pictures that were licensed by negotiation?

A. Right, sir.

Q. Now, the second part of question No. 11 which you answered said:

> And as to each state whether the negotiations followed a rejection of bids.

And in two instances of the 24 you indicated that the negotiations followed a rejection of a bid. ATTACK you put in parentheses "After rejection of written offers."

(4076)

YOU CAN'T RUN AWAY FROM IT, "After rejection of the Viking offer."

A. Yes, sir.

• • •

(4078)

By Mr. Goffman:

Q. Mr. Wren, the computations that you testified to last week on the Warner Brothers pictures were on the same basis as the calculations Mr. Nizer examined you about; isn't that right?

A. Yes, sir.

Q. In other words, you took the same gross as the pictures actually received at the theatre where they played and the same playing time and you applied that to the Viking terms?

A. Yes, sir.

Q. And we have called that a "hindsight theory"?

A. Yes, sir.

Q. Because nobody knew what the picture was going to do before

(4079)

the picture was awarded?

A. No, not that particular picture, but the bidding department, the evaluating department that you often referred to, certainly would have prior performance at various theatres.

Q. But as to this particular picture that you made the calculation, nobody knew at the time of the awards what that picture would gross?

A. No, sir.

Q. All right; now, I would like to refer you first to the Warner Brothers picture BLOOD ALLEY.

A. Yes, sir.

Q. Do you have your sheets on Warner Brothers pictures?

A. I do, sir.

Q. Now, in your calculation I think you stated that the difference in the film rental which the Viking would have paid as against the film rental that the Stanley Theatre actually paid was about $1500 after deducting advertising for both?

A. No. I think it is—that that is incorrect, sir. We at that time said that, but by—after deducting advertising, it wouldn't be that great, sir.

Q. Isn't that correct?

A. No.

Q. If—

(4080)

A. After deducting advertising that we would have had under ours, it isn't as great as $1500.

Q. It is less?

A. Yes, sir.

Q. Well, you did testify, though, that you would have been $1585?

A. That is right, sir.

Q. Do you want to correct that answer?

A. Because you had the advertising data not—unavailable.

Q. Do you want to correct that?

A. Yes, sir.

Q. What is the correct figure now by your computation?

A. $274 more from the Viking Theatre.

Q. In other words, the difference between these two on the basis of your calculation is only $274?

A. That is right, sir.

Q. Now, what difference did you make in your calculation that you had not made last week?

A. The advertising. We added the advertising.

Q. Now, how much was that difference?

A. $5312.

Q. Instead of four thousand?

A. Yes, sir.

(4081)

Q. All right; now, you did not in taking that $5300 figure, the new figure you have taken, make any allowance for billboards, did you?

A. No, sir, because as I have explained, Mr. Goffman, if it was—

Q. Well, just answer my question. You didn't make any allowance for billboards?

A. Yes. We did, sir. Now, if an advertising budget is set up with a film company for X amount of dollars, it includes all advertising media.

• • •

Q. When you changed the estimate of $4000 from the calculation you made last week to 5300 and some odd dollars—

(4082)

A. $12.

Q.—$5312 to the calculation you made today, I said to you: You did not include in that figure billboard advertising, did you?

A. Yes, sir.

Q. You did include it?

A. Yes, sir.

Q. Well, did you make an exact computation of that $5315?

A. No, because what I am trying to explain to you is the fact that at any time an ad budget is set up with any of the film companies, if the amount is five, six, seven, eight or $10,000, it includes all media.

Q. Yes; but where did you get the $5315?

A. By multiplying the $2656 that was reimbursed to the Stanley Theatre by two.

Q. And that was your $5312?

A. Yes, sir, $5312.

Q. But that did not include any allowance on your part in making this calculation for billboards, did it?

A. Yes, sir.

Q. Well, you—

A. It automatically would.

Q. Didn't you just tell me that you took the figure that the

(4083)

Stanley Theatre actually was reimbursed, $2649,—

A. Right, sir.

Q. —and multiplied it by two?

A. 2660—and $56.

Q. $2656?

A. Right, sir.

Q. And multiplied it by two?

A. Right, sir.

Q. And that gave you $5312?

A. That is right.

Q. Now, that didn't have anything added to it for billboards?

A. No, sir; it wouldn't have, because—

• • •

Because if a campaign is set up with Warner Brothers, which we subsequently had on BABY DOLL, there is no special provision for billboards. It is all part and parcel of an ad campaign. Where the Mastbaum Theatre

(4084)

might use a roof sign, we would divert that money into billboards or lobby displays, however we saw fit, the advertising campaign manager and myself, or my manager.

• • •

Q. Now, let me proceed. If you had added an additional $1400 for billboards to the figure you gave us today—if you had added that, that would have made the film rental that the Viking would have played less than the amount received from the Stanley, wouldn't it?

A. No, sir, because you could have never gotten a film company to approve it. You are asking the film company to go for another 1500 or $1800 to make your figure come out right.

• • •

(4086)

Q. Will you answer that question, then. If you had added the 1400 or $1500 for billboards, that would have made the return of film rental from the Viking less than the amount that you have got?

A. We have done it. Originally we figured—

Q. Now, just a moment.

A. —$4000. I am trying to explain to you—

The Court: Well, now, Mr. Wren, you can answer that question on the assumption.

The Witness: Oh, on the assumption?

The Court: Yes, right or wrong.

The Witness: If you added fourteen or $1500 more, it would have meant less; yes.

By Mr. Goffman:

Q. Now, let me ask you, please, in the experience of the Viking Theatre itself, have you had any pictures that have done a total gross at the boxoffice totalling approximately the same amount as BLOOD ALLEY did at the Stanley, which was, according to your testimony, $23,700?

A. Yes, sir.

(4087)

Q. For an entire engagement. What was the closest picture in total gross for its performance at the Viking that did about $24,000. Is it TONIGHT'S THE NIGHT which did $25,000?

Mr. Sawyer: Well, TONIGHT'S THE NIGHT is not in it. Are you taking TONIGHT'S THE NIGHT?

Mr. Goffman: Well, I am just asking him.

The Witness: Well, the first two weeks of STUDENT PRINCE did $50,000.

By Mr. Goffman:

Q. I am not asking you about first two weeks, Mr. Wren. Just answer my question. I am asking you for a total engagement of a picture at the Viking during the period—

A. During a two-week period?

Q. Not a two-week period. I said, a total engagement of a picture at the Viking that did a total gross at the boxoffice for the entire engagement of $23,700 or approximately that amount.

A. No, sir. It would be hard to find any two weeks—

Q. Well, now, let me—

A. —that would come out that way, sir.

Q. Well, I am not asking you for two weeks, Mr. Wren. I am asking you for the total engagement, whatever it was at the Viking, where the total gross was closest to the amount that BLOOD ALLEY did in total gross; namely, $23,700?

(4088)

A. No, sir.

Q. Well, is it the closest to that TONIGHT'S THE NIGHT which did $25,860?

A. There, again, you are comparing four weeks to two weeks—

Q. I am just asking you—

A. —and two weeks to four weeks.

Q. —for total gross. Please don't tell me about weeks now—total gross. Wasn't TONIGHT'S THE NIGHT a total gross of $25,860?

A. Yes, sir.

Q. All right; now, isn't that the closest total gross that was done to the gross of $23,700 for BLOOD ALLEY?

A. Yes, sir.

Q. All right; and the second closest gross was NEVER SAY GOODBYE which was nearly $21,000?

A. Yes, sir.

Q. All right; now, I would like to make some calculations with you.

* * *

Q. All right; we will take the picture played at the Stanley

(4089)

Theatre.

A. Yes, sir.

Q. That is 2900 seats?

A. Yes, sir.

Q. And it was BLOOD ALLEY; and what was its gross, $23,700?

A. In two weeks.

Q. Now, let us take the Viking. That is 1000 seats?

A. Yes, sir.

Q. And the closest picture in total gross—which one do you want to take?—

Mr. Sawyer: It is down to 100 there, Mr. Goffman. I think that is a kind of a Freudian slip.

By Mr. Goffman:

Q. Which one do you want to take? Do you want to take TONIGHT'S THE NIGHT?

A. Your preference.

Q. Or NEVER SAY GOODBYE?

A. Your preference. It makes no difference.

Q. All right; let us take TONIGHT'S THE NIGHT. Now, what was the total gross of that engagement at the Viking?

A. $25,860.

Q. $25,860. That is close. All right. Now, how long did that engagement take at the Viking to make that gross?

(4090)

A. Four weeks.

Q. And what was the total advertising expense for the engagement of that picture?

A. I don't know.

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(4091)

Q. All right; let us use NEVER SAY GOODBYE; and what was the total gross at the Viking of NEVER SAY GOODBYE?

A. $20,799.

Q. That is even less than BLOOD ALLEY?

A. Yes, sir.

Q. All right; and how many weeks did that take?

A. $3000 less. Pardon me?

Q. How many weeks did that take?

A. Three full weeks, sir.

Q. Three full weeks?

A. Right, sir.

Q. And what was your advertising, total advertising for the engagement of that picture, distributor and exhibitor?

A. NEVER SAY GOODBYE, total expenditures for advertising, $9,015.

Q. All right; now, in your bid for BLOOD ALLEY you bid house expense of $5,070; is that right?

A. $5,420, sir.

Q. All right; that is including news, shorts, and other products?

(4092)

A. Yes; that is right.

Q. All right; let us say "weekly."

A. $5,400.

Q. $5,420?

A. Right, sir.

Q. All right; now, if in order to make this gross it took you the three weeks that it took you to make NEVER SAY GOODBYE, which was a lower gross in three weeks, we multiply that by three, don't we? That is $16,260; is that correct?

A. Multiplying $5,420 by three comes to $16,260. I will agree; yes, sir.

Q. At that time?

A. Yes, sir.

Q. Three weeks of this same house expense that was in your bid for BLOOD ALLEY?

A. Mr. Goffman, you can't have three weeks' expense—

Q. Is that correct?

A. No. It is not correct. You can't have three weeks' expense—

Q. Is the mathematics?

A. —on two weeks' business.

Q. Now, Mr. Wren, just follow me, please. Is the mathematics correct? First tell me this.

(4093)

A. Are you assuming, Mr. Goffman?

Q. Is the mathematics correct?

A. Three times 5,420 comes to $16,260. I will agree to that, sir.

Q. All right; and if by your experience at the Viking with the picture that was closest in total gross for the engagement, it took you three weeks to earn that gross and the same three weeks to earn a similar gross, then $16,260 is the right computation for weekly house expense for three weeks; isn't that right?

A. Definitely not, sir.

Q. All right.

A. In one week I have grossed $34,000—

Q. Just a moment.

A. —and why should I accept this for three weeks?

Q. Now, just a moment, Mr. Wren. I am asking you and you selected for me the picture that was closest in total gross.

A. No. You selected them from me, sir. You told me that those were the pictures closest to 23,000—

Q. Well, will you—

A. —and I concede it.

Q. Well, will you look and see if there is any other picture that had a total gross—a total gross for its entire engagement at the Viking?

(4094)

A. I am not talking in terms of entire engagements. I am talking two weeks.

Mr. Goffman: Your Honor, I would like the witness to answer my question.

By Mr. Goffman:

Q. Will you answer my question.

A. I have said that for the entire engagements NEVER SAY GOODBYE and TONIGHT'S THE NIGHT—

Q. All right.

A. —are closest to $23,700.

Q. All right; then we are agreed on that?

A. Only in amounts.

Q. In amounts; that is all. Now, we are also agreed that it took the Viking three weeks to earn that amount on NEVER SAY GOODBYE.

A. No, sir; it didn't—on NEVER SAY GOODBYE; yes, sir.

Q. All right.

A. Yes, to gross.

Q. Right.

A. Not to earn—to gross.

Q. All right; well, then, let us proceed. Now, if we subtract this $16,000 for three weeks expense from the BLOOD ALLEY'S gross, that $23,700, that leaves us with 7,440; is that correct? Is my mathematics right?

(4095)

A. 1620 from 2370 leaves 7440; yes, sir.

Q. 7440. Now, yours was a 90/10 bid, was it not, for the Viking?

A. Yes, sir.

Q. All right; we apply 90 per cent of that, brings it down to $6700, roughly; is that right? 90 per cent of 7440 is $6700; is that right?

A. Approximately; yes, sir.

Q. All right; now, if you apply there again the same advertising that you, in fact, incurred for the total engagement of NEVER SAY GOODBYE, that is $9015; is that correct?

A. I will never figure—

Q. That figure is correct, is it not? 9015 is correct?

A. Take this from this, but I will never say that three weeks' advertising is the same as one.

Q. Mr. Wren, just answer my question. The $9015 is the total advertising for the three weeks' engagement of NEVER SAY GOODBYE?

A. Yes, sir.

Q. All right; now, if we were to subtract that from the $6700 film rental, there would be a deficit, so that there would be no film rental on this calculation; is that right?

A. Yes, sir.

(4096)

Q. And instead Warner Brothers would have to send you $3700 to make up the deficit in advertising; isn't that right?

A. 67 from 90 leaves 37, sir?

Q. No. They are not right. Just by gross, 23, right, $2300? Warner Brothers would have to send you a check for $2300 in addition to getting no film rent by this calculation?

A. Oh, by this calculation? Yes, sir.

Q. All right; now—

A. Yes, sir.

(4097)

Q. Now, I would like to turn for a minute to the picture SERENADE. That picture grossed at the Goldman Theatre $61,900, didn't it?

A. Yes, sir.

Q. All right, suppose we do the same thing here.

This is SERENADE at the Goldman, 1200 seats, right, for the Goldman?

A. Less.

Q. Less?

A. Yes.

Q. How many do you want?

A. 1,170 seats.

Q. 1,170?

A. Yes.

Q. And the picture was SERENADE?

A. Yes.

Q. The gross was $61,900, is that right?

A. Correct.

Q. Now, let me ask you the same question: What was the closest picture in total gross for the engagement that played at the Viking Theatre during the period of this suit?

A. THE PRODIGAL.

Q. THE PRODIGAL?

A. Yes.

(4098)

Q. What is the gross of THE PRODIGAL?

Mr. Sawyer: That is wrong.

Mr. Goffman: What is wrong?

Mr. Sawyer: I think it was BRIGADOON.

By Mr. Goffman:

Q. BRIGADOON, do you prefer BRIGADOON, Mr. Wren?

A. Wait until I check it, please. $59,218, BRIGADOON.

Q. Did you want to take BRIGADOON?

A. All right.

Q. And the gross for that you said was $59,218?

A. $59,218, right, sir.

Q. That is, again, about $2,000 less, $2,500 less than the GOLDMAN gross on SERENADE.

How many weeks did it take you to earn $59,218 with BRIGADOON at the Viking?

A. It took us six weeks to gross $59,218.

Q. What was the total advertising account for BRIGADOON?

A. $14,263.

Q. Is that total? May I check?

A. $14,263.

Q. Plus teaser?

A. Oh, yes, plus teaser. We didn't have anything to do with that.

Q. But the distributor paid it.

(4099)

A. Oh, yes.

Q. It would have to come off any calculation, wouldn't it?

A. Yes, sir.

Q. What is the total there?

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Q. Will you just give me the total advertising spent on—

A. If you will show me the bid on SERENADE where I say teaser ads, I will show you this.

Q. Mr. Wren, all I would like to have from you now is the total advertising spent on the engagement of BRIGADOON at the Viking Theatre that produced this gross of $59,218 in six weeks.

A. Including teaser ads, which were no part of our bid it is $15,617.09.

Q. That is the total advertising.

Referring to your bid on SERENADE, your total house expense—shorts, overtime—was $5,320?

(4100)

A. Yes, sir.

Q. All right. That is weekly?

A. Yes, sir.

Q. Now, if we multiply that by six it gives us $31,920, is that right?

A. Six times $5,320 is $31,000, yes, sir.

Q. $31,920, right?

A. Yes, sir.

Q. Now, we deduct that from $61,900, which was the gross of SERENADE at the Goldman, that leaves us $29,980, is that right?

Is that correct, the mathematics?

A. If you take $31,920 from $61,900 it leaves $29,980.

Q. Yes. Yours was a 90/10 bid again?

A. Yes, sir.

Q. Right. So we take 90 per cent of that, is that correct?

A. Yes, sir.

Q. That is $27,000 roughly?

A. I would say twenty-six.

Q. Well, it is almost thirty, isn't it?

A. All right, ten per cent of 30 is $3,000.

Q. Well, that would make it twenty-seven, wouldn't it?

A. No.

(4101)

You are right. I am sorry. You are right.

Q. $27,000.

Now, your advertising on BRIGADOON was $15,617?

A. Yes, sir.

Q. Fifteen six. That leaves a net film rent of $11,400, is that right?

A. Fifteen six from $27,000 leaves $11,400.

Q. Right. What was the net film rental that the Goldman Theatre paid Warner Bros. on SERENADE by your testimony?

A. $19,653.93.

Q. Give me that again.

A. $19,653.93.

Q. So that by this calculation the Viking would have paid $8,200 less than the Goldman actually paid Warner Bros. on this picture, is that correct?

A. By your calculation, yes, sir, it comes out that way.

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(4102)

Q. Mr. Wren, I would like to turn now to the picture HELEN OF TROY.

(Mr. Goffman went to the blackboard.)

Q. (Continuing) Now, that played at the Mastbaum, didn't it?

A. Yes, sir.

Q. 4,000 seats?

A. Yes, sir.

Q. And the gross at the Mastbaum was $64,400?

A. Right, sir.

Q. Now, again, what picture did you play at the Viking Theatre during this period that for its entire engagement had the closest amount of gross receipts to $64,400?

A. BRIGADOON.

Q. BRIGADOON?

A. BRIGADOON. The same one, yes, sir.

Q. All right, BRIGADOON. And that was $59,200, is that right?

A. Yes, sir.

Q. That played at the Viking for six weeks?

A. Yes, sir.

(4103)

Q. And had a total advertising—do you remember that figure?

A. $15,617.09

Q. $15,617.

Now, do you remember or will you look at your chart and see the picture that you actually played at the Viking at the same time that the Mastbaum was playing HELEN OF TROY.

May I help you?

A. ALL THAT HEAVEN ALLOWS.

Q. ALL THAT HEAVEN ALLOWS?

A. Yes, sir.

Q. And that played one week longer at the Viking than HELEN OF TROY played at the Mastbaum, didn't it?

A. Four days longer, sir.

Q. Four days longer?

A. Yes, sir.

Q. What was the gross that ALL THAT HEAVEN ALLOWS made at the Viking in those four weeks and four days?

A. $54,763 gross.

Q. And that was $10,000 less than HELEN OF TROY grossed at the Mastbaum in a period four days shorter, isn't that correct?

A. Yes, sir.

(4104)

Q. Now, in this case the Viking bid a 90/10 deal, distributor to pay all the advertising, didn't it?

A. Yes, sir.

Q. And the bid was for a minimum of three weeks with a hold-over?

A. Yes, sir.

Q. The Mastbaum also bid three weeks, didn't it?

A. Yes, sir.

Q. The Mastbaum had other terms, 70/30, we will call it, in place of 90/10, didn't it?

A. 70/30/10.

Q. Right. And in the Mastbaum's offer the exhibitor paid 30 per cent of the advertising as against your offer where the distributor paid it all, isn't that right?

A. I believe the advertising clause is the same proportion as film rental.

Q. Which would be 70/30?

A. Not if they didn't pay 70 per cent film rental, sir.

Q. Well, then, the distributor would pay less?

A. Yes, sir.

Q. The maximum the distributor could pay would be 70? He might pay as low as 50?

A. Yes, sir.

Q. But in your case the distributor paid all the advertising?

(4105)

A. Yes, sir.

Q. Now, in your case you stated that there was a cash guarantee of $13,500.

A. Right, sir.

Q. In the Mastbaum case there was no such cash guarantee, was there?

A. No, sir.

Q. But on the other hand the Mastbaum had another kind of guarantee, didn't it?

A. What kind, sir?

Q. Didn't the Mastbaum guarantee that it would pay not less than 50 per cent of its gross receipts for the first week?

A. Yes, sir.

Q. 35 per cent of its gross receipts for the second week?

A. Yes, sir.

Q. And 25 per cent of its gross receipts for the third week, as a minimum?

A. Yes, sir.

Q. Now, comparing those two bids, and recognizing that the Mastbaum is a 4,000-seat house as against the Viking being a 1,000-seat house,—

A. Yes, sir.

Q. —don't you think that Warner Bros. might with proper

(4106)

justification have concluded in its own mind—I am not saying that you would agree with it—but in its own mind that the Mastbaum bid was more desirable to it?

A. They evidently did, sir, because they gave the Mastbaum the picture.

Q. Right. And that is a reasonable conclusion for them to make under the circumstances, isn't it?

A. No, sir.

Q. Well, now, let's go through this bid again.

They are both three weeks, aren't they?

A. Yes, sir.

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Q. Are you ready for the next question, Mr. Wren?

(4107)

A. Just a moment, please.

Q. Surely.

A. There is no advertising in the Mastbaum deal unless they pay off on a 70 per cent basis.

Q. And in that event they would pay 30 per cent?

A. No, sir—in that event, yes. If they paid off at a 70 per cent basis they would pay 30 per cent of the advertising.

Q. But the fact—

A. Other than that they pay no advertising.

Q. But there is no obligation on the distributor to pay any advertising either in the Mastbaum bid, is there?

A. No, sir.

Q. Right. And in your bid there is an obligation on the distributor to pay all the advertising?

A. Yes, sir.

Q. 100 per cent?

A. Yes, sir.

Q. All right. So that we have the advertising clauses. Now, they are both three-week bids, isn't that right?

A. Yes, sir.

Q. Yours is a 90/10 deal and theirs is a 70/30 deal?

A. Yes, sir.

(4108)

Q. And there are guarantees in each one; you have a cash guarantee of $13,500 and they have a minimum gross guarantee of 50 per cent the third week, 35 per cent the second week and 25 per cent the third week, isn't that right?

A. 50 per cent the third week?

Q. No, 50 per cent the first.

A. Yes, sir.

Q. 35 per cent the second and 25 per cent the third.

A. Right, sir.

Q. Isn't that right? So that the bids are parallel in most respects as we have discussed them except that in your bid the distributor has to pay 100 per cent of the advertising, isn't that right?

A. And in your bid.

Q. Now, didn't you agree with me that in the Stanley bid for the Mastbaum there is no obligation in the bid for the distributor to pay any advertising? Isn't that right?

A. That's right.

Q. All right.

A. Unless it is on a 70/30/10 basis.

Q. Otherwise the distributor doesn't have to pay anything?

A. That's right.

Q. So that to that extent your bid, where the distributor had to pay 100 per cent in any event, was less desirable, on

(4109)

that point alone?

A. Just on advertising alone?

Q. Yes.

A. Yes, sir.

Q. Now, on three weeks each they are equal, aren't they?

A. Yes, sir.

Q. Minimum time.

A. Right, sir.

Q. And on guarantees you have a $13,500 guarantee in cash and the Mastbaum has 50 per cent, 35 per cent and 25 per cent minimum gross for the first three weeks?

A. And no advertising.

Q. And no advertising.

A. Yes, sir.

Q. Right.

Now, don't you think, therefore, that with these two bids, parallel as they are, Warner Bros. was entitled in its own judgment, whether you agree with it or not, to select the Mastbaum as the more desirable bid on this particular picture?

A. No, sir.

Q. Is that only because of the cash guarantee?

A. And the advertising, the ambiguous advertising clause.

Q. Well, now, you say ambiguous. Yours is not ambiguous,

(4110)

is it?

A. Mine is definite.

Q. In yours the distributor must pay 100 per cent?

A. Yes, sir.

Q. So that you pay nothing and Warner Bros. would pay all the advertising?

A. Yes, sir.

Q. And in the case of the Stanley bid for the Mastbaum Theatre, the distributor had no obligation as you read it, isn't that right?

A. He had no obligation on 50, 35 or 25.

Q. Right. And if the 70 per cent was reached the distributor would only have to pay 70 per cent of the advertising?

A. Yes, sir.

Q. Instead of a hundred per cent in your case?

A. Yes, sir.

Q. Therefore, the Mastbaum bid was better in that respect?

A. No, sir, because if he had paid 70 per cent they were also going to guarantee the Mastbaum 10 per cent profit of the gross receipts, 10 per cent of the gross receipts as profit.

Q. But, Mr. Wren, the guarantee to the distributor is perfectly clear, irrespective of profit, to pay 50 per cent

(4111)

the first week at the Mastbaum, 35 per cent the second and 25 per cent the third, isn't that right?

A. As is our guarantee of $13,500. That is perfectly clear too.

Q. That's right. And all I am saying to you is that these two bids have a number of terms. They are complicated. Some are comparable one way and you think some are comparable the other way. But what I am asking you is this, isn't the judgment of Warner Bros. in awarding this picture to the Mastbaum on these two bids a matter of business judgment which you may or may not agree with, but it was business judgment?

A. I do not agree with that, sir, no, sir.

Q. You think that is because of your guarantee?

A. Yes, sir.

Q. And you are not willing to concede that the guarantee of the Mastbaum of 50, 35 and 25 is at least the equivalent of $13,500 in cash?

A. No, sir, not when you leave $8,500 worth of advertising laying out there.

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(4112)

Q. Now let me ask you this. What was the first week's film rental by your calculation that was paid by the Mastbaum, just for the first week of the engagement?

A. 50 per cent of $29,000 comes to $14,600, sir.

Q. So in the first week the Mastbaum paid as film rental more than your whole guarantee, didn't it?

A. Yes, sir.

Q. Now, in making your calculation you omitted altogether the matter of advertising, which, as you have testified, the distributor would have had to pay 100 per cent, isn't that right?

A. Yes, sir, from both computations.

Q. I know that. But in the case of your offer it would have been 100 per cent?

A. Yes, sir.

Q. In the case of the Mastbaum offer it would have been 70 per cent or less.

A. It was 100 per cent in the Mastbaum offer.

Q. There was no obligation to pay 100 per cent, was there?

A. But they did, and when they reverted to 50, 35 and 25 they—

Q. Mr. Wren, did you make any computation of the amount that the Mastbaum actually paid in advertising?

(4113)

A. No, sir.

Q. That the distributor actually paid?

A. Yes, sir.

Q. You did make that computation?

A. Yes, sir.

Q. How much was it?

A. $8,455.

Q. All right. Now can we go back to your figures. You testified that the Mastbaum paid a film rental, as I recall it, of $23,378.

A. Yes, sir.

Q. You didn't give us that before but you are now giving us the advertising that the distributor paid. How much was that?

A. $8,455.

Q. 8,455. That leaves a net film rental to Warner Bros. of $14,923, is that right?

A. Yes, sir.

Q. Net film rental, all right.

Now, in making your computation you made no allowance for advertising at all, did you, in making your computation on what the Viking would have paid?

A. Since we found this we have, yes, sir.

Q. All right. Now why don't we make our calculation over

(4114)

here and see what it is.

A. Good.

Q. Now, in the case of HELEN OF TROY your bid was house expense, advertising, shorts and overtime, things like that,—

A. $5,320.

Q. $5,320 weekly?

A. Yes, sir.

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Q. Mr. Wren, do you understand the computation I am making? When you made your computation—follow me, please, if you will.

(4115)

A. I am, sir.

Q. When you made your computation you compared that the Viking would make in this same period of time the same gross that the Mastbaum, for example, or the other theatres that you compared with would make in that time for that picture, isn't that right?

A. In the same playing time.

Q. In the same playing time.

A. Yes, sir.

Q. Now the comparison I am making is based on the experience of the Viking, what it did with one of its own

pictures that had the nearest similar gross for a total engagement. Do you understand that?

A. Yes, sir, but you were going back to ALL THAT HEAVEN ALLOWS.

Q. No, I am here at BRIGADOON, which is the closest picture.

A. You just selected HEAVEN ALLOWS, sir.

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(4116)

Mr. Sawyer:

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It just seems to me that there is a limit to how far you can go in making these comparisons. It seems to me that the defendants were the first to object on the grounds not that it was objectionable in an evidentiary sense but that it just couldn't possibly be put in because it didn't prove anything.

Now, Your Honor, it seems to me that is this kind of situation. He is taking terms of some other offer on some other picture. If he wishes to show that films of comparable national film rental—that the Viking grossed less on that film, for instance, than the Mastbaum did, on HELEN OF TROY, it seems to me that is legitimate, but to take—to select BRIGADOON for that purpose would be legitimate, and to say "That is the closest one below and the

(4117)

closest one above was PRODIGAL." And you would compare how we grossed on it. But to apply our terms on BRIGADOON with respect to other matters, advertising and the like, to HELEN OF TROY is meaningless when we have our terms on HELEN OF TROY before us.

Now, that is why I think it is so far fetched that it becomes a total distortion. Not the use of BRIGA-

DOON. For some purposes I think that would be reasonable, if it is the closest. It would be reasonable, for instance, to show grossing ability. If he compared the national gross of HELEN OF TROY with BRIGADOON and said, "We earned $64,000 on HELEN OF TROY, which had X national gross"—I don't know what it was—"and you only earned $59,000"—excuse me, grossed on BRIGADOON, and that had maybe a better one—I don't know if it did or not. That seems to me agreeable. But why apply BRIGADOON advertising terms and BRIGADOON advertising expenditures to a different motion picture when we have available the bid and the advertising terms on HELEN OF TROY? Because who knows what special considerations might have gone in which would have prompted the theatre, any theatre, to spend more or less on advertising on a particular motion picture?

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(4118)

By Mr. Goffman:

Q. Now let me just review this with you, since you are somewhat confused with another picture.

We have agreed, have we not, Mr. Wren, that

(4119)

the picture that had the closest gross receipts for a total engagement to $64,400 was BRIGADOON, which grossed $59,200 at the Viking?

A. No, sir, because we switched to a picture that had the same playing time as HELEN OF TROY, as you are suggesting, a picture called ALL THAT HEAVEN ALLOWS, which was playing at the same time as HELEN OF TROY.

Q. All right. Now I am finished with that. Do you mind? Now will you please—

A. Finished with what, sir?

Q. With ALL THAT HEAVEN ALLOWS.

A. All right, fine.

Q. Now will you agree that BRIGADOON, which grossed $59,200, had the closest gross to the $64,000 which HELEN OF TROY did at the Mastbaum, or would you rather have PRODIGAL? Mr. Sawyer mentioned PRODIGAL.

A. Use BRIGADOON.

Q. Use BRIGADOON?

A. Yes, sir.

Q. All right, we will use BRIGADOON.

Now, in six weeks, which is what it took the Viking to earn $59,000 on BRIGADOON,—

A. On BRIGADOON, yes, sir.

Q. Right. In six weeks the expense would have been

(4119a)

$32,000, is that all right?

A. Yes, sir.

(4120)

Q. Now, the gross was 64,400. Now, 90 per cent of that is $29,000. Is that close enough?

A. Yes, sir.

Q. Now, your actual advertising for the engagement of BRIGADOON, which was your experience at the Viking Theatre, with a picture that grossed only $59,000, instead of HELEN OF TROY'S $64,000 at the Mastbaum, was $15,617 of total advertising; is that right?

A. That gross spent in six weeks on BRIGADOON, $15,617, to advertise the picture; yes, sir.

Q. That is right; and in those six weeks you grossed at your box office $59,200; isn't that right?

A. Yes, sir.

Q. All right; now we subtract those two figures; we have left $13,383, which would be the net film rental which

the Viking would have paid as against the figure you gave us a little while ago of $14,923 that the Mastbaum paid?

Mr. Sawyer: On another picture.

Mr. Goffman: On HELEN OF TROY.

The Witness: Yes, sir.

Mr. Goffman: HELEN OF TROY.

By Mr. Goffman:

Q. And, therefore, the Viking would have paid less $1600,

(4121)

is that right? Thirteen three from fourteen nine is sixteen hundred?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

Q. I would like to come next to Warner picture THE McCONNELL STORY. Now, will you agree with me, without making the calculation in the same form that I have heretofore made it, following my application of the total gross of the picture in question to the performance of the Viking with the nearest picture having a total gross of the same amount for its entire engagement, and the Viking's experience with that engagement would produce a lower return on THE McCONNELL STORY from the Viking than it, in fact, got from the Randolph; would you agree with that?

A. On the same type of computation—

Q. Yes.

A. —using a similar gross?

Q. Yes.

A. As of this?

Q. Yes.

A. I won't agree with it, but it will work out this way.

Q. You won't agree with it?

(4122)

A. No, sir.

Q. All right; well, then, we will make it.

How many seats in the Randolph, Mr. Wren?

A. 2020.

Q. McCONNELL STORY?

A. Yes, sir.

Q. Total gross at the Randolph?

A. $24,236.77.

Q. 24,236.77. Now, here, again, what was the picture that had the nearest amount of gross receipts to that amount? Was it TONIGHT'S THE NIGHT, twenty-five eight?

A. Yes. Sure.

Q. All right; how long did that play?

A. TONIGHT'S THE NIGHT?

Q. Yes.

A. Three weeks.

Q. At the Viking?

A. Three weeks and three days.

Q. Three and three-sevenths weeks? All right?

A. Yes, sir.

Q. And what was the total advertising spent on the engagement of that motion picture at the Viking?

A. $11,563.

Q. All right; now, in your bid on THE McCONNELL STORY you

(4123)

bid house expense of 5,250; is that right?

A. On THE McCONNELL STORY, 5250 plus $150?

Q. 150 for shorts, total of $5400?

A. Yes, sir.

Q. Is that right?

A. Right, sir.

Q. All right; now, if you take the same three weeks, that comes to a total of $16,200; is that right?

A. Yes, sir.

Q. Now, this was an 80/20 bid where the advertising was figured in the film rental. This is a little different. Wasn't it? Wasn't that right?

A. Yes, sir.

Q. On yours.

A. Yes, sir.

Q. All right; so that we have to add the advertising to this expense before we calculate the film rental; is that right?

A. Yes, because we are paying 20 per cent of the advertising.

Q. All right; so we add it to this, advertising, 11,563.

A. Oh, now, wait. Just a moment, please. Our bid specifically states that the advertising the first week is $4,000 and the second week a thousand. That is part of our bid.

(4124)

Q. Is that part of your bid?

A. Oh, yes, sir.

Q. Or is that part of your calculation?

A. May I see the bid, please, on McCONNELL STORY?

(Document handed to witness.)

The Witness: You are right.

By Mr. Goffman:

Q. Is that right? It is not part of the bid?

A. No, sir. That was put down—

Q. It is your calculation.

A. It is put down wrong here.

Q. It is a wrong estimate on your part?

A. Yes, sir.

• • •

(4125)

Q. All right; do you follow my figures, then, Mr. Wren?

A. I am following your figures.

Q. All right.

A. The $11,563 worth of advertising was paid in its entirety by the Viking Theatre on TONIGHT'S THE NIGHT.

Q. All right; that was the advertising expense for the engagement of TONIGHT'S THE NIGHT which got a total gross of $25,800 in three and three-sevenths weeks.

A. And the Viking paid all of the $11,563 worth of advertising on TONIGHT'S THE NIGHT, right through there.

Q. Mr. Wren, I will move that that be stricken, because I am not asking you who paid this. I am making the computation of what was paid, Mr. Wren, what was paid in advertising to produce this gross in this period of time. Do you see that?

A. The Viking to produce a gross of $25,800 in addition

(4126)

to film rental paid $11,563 of advertising to gross $25,800.

• • •

Q. All right; now, if we add these two figures together, Mr. Wren, the $16,200 for three weeks' house expense and the $11,563 for advertising, that gives us a total of 27,763; isn't that right?

A. Adding 16,200 and 11,563 makes a total of 27,763.

Q. All right; and you would have paid 80 per cent of that as film rental, wouldn't you?

A. 80 per cent of what?

Q. Of 27,763.

(4127)

A. I would have paid 80 per cent of 27? You have added the expenses together and asked if I paid 80 per cent film rental on it?

Q. Your bid was 80 per cent of film rental.

A. Not of expenses.

Q. Your bid was 80 per cent—

A. Of the gross.

Q. Of the gross. I beg your pardon. I beg your pardon. You are right. 24,236.77. Now we subtract the expenses of 27,763. What have we got left? Zero. You paid no film rental at all.

A. No, sir.

Q. Isn't that right?

A. That is right, sir.

Q. All right; now, I take you to PETE KELLY'S BLUES.

A. May I see the PETE KELLY'S BLUES bids, sir?

Q. The bid?

A. Yes, please.

Mr. Goffman: Do you mind giving the witness the PETE KELLY'S BLUES bid?

The Witness: Thank you.

By Mr. Goffman:

Q. What was the seating capacity you said for the Goldman?

A. Make it 1200.

(4128)

Q. 1200?

A. It is just under twelve.

Q. Now, what was the total gross of PETE KELLY'S BLUES at the Goldman?

A. 55,559.18.

Q. Suppose we say 55,560; is that all right?

A. Good, sir.

Q. Now, the same question: What was the nearest picture in total gross?

A. ALL THAT HEAVEN ALLOWS.

Q. ALL THAT HEAVEN ALLOWS; all right; and what was its gross at the Viking?

A. 54,762.

Q. How long did it take the Viking to make that gross on ALL THAT HEAVEN ALLOWS?

A. Four weeks and four days, sir.

Q. Four and four-sevenths; right?

A. Yes, sir.

Q. And what was the total advertising expense on the engagement of ALL THAT HEAVEN ALLOWS at the Viking?

A. 8165.

Q. Plus?

A. 16.

Q. Plus? Will you look at your figure again?

(4129)

A. Oh, you mean both of them? Plus the 10,524.25.

Q. 10,524.25?

A. 24.25; right, sir.

Q. And this was the same kind of bid as McCONNELL STORY. You had 5250 house expense?

A. Yes, sir.

Q. And 150 for shorts?

A. Yes, sir.

Q. Total of 5400.

A. Right, sir.

Q. And four and four-sevenths weeks for 5400 is 24,700. You want to check me on that?

A. That is right, sir. You are right.

Q. Approximately right; and your advertising, 10,524?

A. $24.25, right, sir. 24.

Q. That makes 35,224. All right; now we have got a gross here of 55,560. We deduct from that the advertising expense of 35,224.

A. The advertising expense? No, sir. The total expense is 35,224.

Q. Correct. That makes a balance of 20,336, and your commitment was to pay 80 per cent of that as film rental; is that right?

A. Yes, sir.

(4130)

Q. That would have been roughly $16,200; am I right on that?

A. Yes, sir.

Q. And what did you testify the Goldman Theatre actually paid to Warner Brothers for the engagement of PETE KELLY'S BLUES after advertising deduction?

A. $19,228.

Q. So that the Viking was $3,000 less?

Mr. Sawyer: Objected to—the Viking was. I object to that, Your Honor, because—

Mr. Goffman: The computation of the Viking—

Mr. Sawyer: All right.

Mr. Goffman: —is three thousand less.

By Mr. Goffman:

Q. Is that right?

Mr. Sawyer: On some other motion picture—

The Witness: Yes, sir.

Mr. Sawyer: —at some other time.

Mr. Goffman: Well, I object to that, Your Honor.

By Mr. Goffman:

Q. Now, may I point this out also, Mr. Wren, and ask you this question: PETE KELLY'S BLUES played at the

Goldman on a Labor Day weekend, and I think you have already testified

(4131)

here that you couldn't have played PETE KELLY'S BLUES on the Labor Day weekend, didn't you?

A. Yes, sir.

Q. All right; now, you have made some objection to some of the advertising allowances that we have been using or the advertising figures that we have been using in these computations. Aren't those pretty standard advertising figures for all of the engagements at your theatre for the same period of time?

A. You mean $10,000? No; they are not standard.

Q. Well, you paid $10,000 total advertising in ALL THAT HEAVEN ALLOWS for four and four-sevenths weeks; is that right?

A. Right, sir.

Q. Now, HIT THE DECK, which was five weeks, was thirteen thousand some odd dollars; isn't that right?

A. Just a moment, sir. All right, sir.

Q. And GLASS SLIPPER, which was four weeks, was $13,600?

A. Right, sir.

Q. And BIG KNIFE, which was four and two-sevenths weeks; was that $11,160?

A. Right, sir.

Q. And THE GIRL IN THE RED FLANNEL SWING, which was less

(4132)

than four weeks—RED VELVET SWING—

A. We have even a change in the color of the swing.

Q. —which was less than four weeks was $10,580, wasn't it?

A. Yes, sir.

Q. So there is nothing unusual about the amount that the Viking Theatre paid for advertising or that was spent for advertising in this engagement for ALL THAT HEAVEN ALLOWS or any of the other engagements that we have used as examples, is there?

A. Not for in the examples; no, sir.

Q. Now, will you turn your attention to STRANGE LADY IN TOWN. That was the picture you didn't testify in your direct examination, you remember, and you thought of it during the cross?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. And you said there that you made a guarantee of $5000 to the distributor on that picture?

A. That is right.

Q. When you made that guarantee, what gross did you estimate in your own mind would be produced by that picture?

A. Oh, I don't have any idea now, sir.

Q. Well, with your experience, what would you think would

(4133)

be a fair estimate of gross for you to make a guarantee of $5000 as film rental on a picture?

A. $10,000, $12.000, depending on how badly you needed a picture.

Q. I see; well, now, if you bid $10,000 on this picture.

A. If I bid $10,000, sir?

Q. I mean, if you estimate a gross of $10,000 on this picture.

A. Yes, sir.

(4134)

Q. And you paid film rental of $5,000 and you played it for two weeks and spent $10,000 in house expenses. That would mean they would have $15,000 of expenses?

A. Yes, sir.

Q. And $10,000 worth of income?

A. Right, sir.

Q. Now, isn't it a fact though that you don't bid in order to lose money, you bid in order to make money on a picture, don't you?

A. Yes, sir.

Q. Now, in order to make money on this picture with a minimum film rental of $5,000 you would have to gross at least 20 to 25 per cent, wouldn't you, to make money on that picture?

A. With $15,000 expenses I would have to gross twenty to $25,000 to make money? If I grossed $16,000 I would be making money, sir, if I had $15,000 of expenses.

Q. Well, if you grossed $16,000 in a short period of time, but don't you think that fifteen to $20,000 is a fair estimate of the gross, that is, the minimum, say, for you to break even.

A. Not if I have $15,000 worth of expenses. I could gross $15,000 and $1 and make money.

Q. I see.

(4135)

Now, over what period of time has the Viking experience shown that it takes you to gross $15,000 in one engagement, for an entire picture, the entire engagement of a picture?

A. Do you mean the entire playing time, sir?

Q. Yes, the entire playing time of a picture to make $15,000?

A. Well, COMANCHE in one week and five days $16,075.

Q. All right, that is nearly two weeks.

A. Yes, sir, one week and five days. It is the same playing time as STRANGE LADY.

Q. And therefore, if you only grossed that you would lose money, wouldn't you?

A. Just a moment, sir. Including the guarantee I would have expenses of $13,500.

Q. And how about advertising, what is the advertising you spent on a picture that has a sixteen thousand or $17,000 gross?

A. Well, let us look at COMANCHE.

Q. Well, COMANCHE you spent—why don't you take COMANCHE. You spent $5,000 on that, didn't you?

A. Yes, sir.

Q. And then if you add that to your $13,000 that is $18,000; isn't that right?

(4136)

A. No, I am only going to add my share, which is $2,037.

Q. You are going to add your share. All right.

A. That is what I would be obliged to pay.

Q. That takes you to what, $17,000?

A. No, $15,537.

Q. And your gross was $16,000 so you just about break even?

A. Yes, sir.

Q. And if you are going to make any money on such an offer it would have to be an expected gross of close to $20,000?

A. I would make money. I just illustrated, I did make money.

Q. Mr. Wren, what did it make, $2?

A. If I make 50 cents I have made money on the engagement.

Q. I see, but wouldn't it be a fair estimate to say that if $16,000 gross is a break even point—it is fair to estimate that you should gross more if you expect to make money, $18,000 or $20,000, something like that, isn't that right?

A. Mr. Goffman, it is not a fair estimate, because if I am in dire need of a picture I might spend $5,000 to make $3,000 in order to keep the house open.

Q. Would you agree with me that when Warner Bros. appraised your bid it would in its own mind be completely

(4137)

justified in feeling that a picture like STRANGE LADY, which hadn't played yet, which therefore nobody knew what it would do, would gross $20,000 or better first-run Philadelphia; would that be a fair opinion for Warner Bros. to have about this picture?

A. I don't know what their opinions were, sir.

Q. Well, would that be a fair opinion for them to have that a picture with Greer Garson, a picture like STRANGE LADY, would gross at least $20,000 downtown Philadelphia?

A. It would be just as fair to assume that it would be $10,000 as $50,000.

Q. But wouldn't it be fair, wouldn't you agree that a distributor who in his own mind felt that it would gross $20,000 would not be making a wild estimate on a picture that had Greer Garson in it?

A. No, sir.

Q. And on $20,000 if Warner Bros. would license it at 40 per cent it would receive $8,000 in film rental, wouldn't it?

A. If they licensed it at 50 per cent it would be $10,000.

Q. But if they licensed it at 40 per cent they would receive $8,000 in film rental, wouldn't they?

A. Yes, sir.

(4138)

Q. And if they licensed it at 35 per cent they would receive $7,000 in film rental?

A. Yes, sir.

Q. And both of those figures are higher than the amount of your guarantee of $5,000, aren't they?

A. Yes, sir.

Q. Right. Now, as a matter of fact, you had testified that in the case of STRANGE LADY you had a better engagement with GLASS SLIPPER?

A. Yes, sir.

Q. And by the computation, even your own computation of the gross advertising and film expense, you would have lost money on the engagement of STRANGE LADY; by your computation, taking the gross that it actually did.

A. Yes, sir.

Q. You would have lost money?

A. Yes, sir.

Q. Therefore you have no real grievance about not having received this picture from Warner Bros., have you?

A. I certainly do, sir. Supposing I hadn't gotten GLASS SLIPPER what would I have played?

Q. Mr. Wren, as it turns out now, this is hindsight, your analysis was all hindsight, in hindsight you didn't lose anything.

(4139)

A. In hindsight I got GLASS SLIPPER.

Q. And you didn't lose anything by not getting STRANGE LADY. In fact—

A. Except the picture called STRANGE LADY, which is the only thing I lost.

Q. Based on your computation, in the hindsight of what you lost we saved you money by not giving you the picture, isn't that right, Mr. Wren?

A. Yes, sir. You saved me money by not giving me the picture.

Q. Thank you.

Now I would like you to turn to the Warner Bros. picture TOWARD THE UNKNOWN.

This was the case of another shall we say, small picture.

A. May I have the bid, please?

Mr. Goffman: Mr. Steinberg, will you give it to him?

(Mr. Steinberg handed papers to the witness.)

By Mr. Goffman:

Q. Have you examined your bid, Mr. Wren?

A. Yes, sir.

Q. This was a bid where you bid a sliding scale.

We already explained to the jury what sliding

(4140)

scale is.

A. Yes, sir.

Q. And the Goldman Theatre bid sliding scale, isn't that right?

Mr. Sawyer: The bid of the Goldman Theatre.

(Mr. Steinberg handed papers to the witness.)

The Witness: Yes, sir.

By Mr. Goffman:

Q. In both cases there was no cash guarantee?

A. No, sir.

Q. And in your case you bid a minimum run of three weeks.

A. And a minimum of 50 per cent the first.

Q. That is right.

A. 40 to 50 the second, and 30 to 50 the third.

Q. That is right.

Q. And Goldman bid an indefinite run?

A. Yes, sir.

Q. Termination of engagement to be left solely to the distributor?

A. Yes, sir.

Q. Isn't that right?

Now, taking those two bids—

A. And a minimum of 25 per cent.

Q. Yes.

(4141)

A. Right, sir.

Q. But the run was indefinite?

A. Yes, sir, and a minimum of 25 per cent?

Q. Mr. Wren, you have said that twice.

A. Yes, sir.

Q. And it was not in response to my question.

Now, let us repeat it. You had bids where neither had a cash guarantee, is that right?

A. Right.

Q. And both had sliding scales?

A. No, sir.

Mr. Sawyer: That is what you keep saying, you see.

Mr. Goffman: Well, they have sliding scales.

The Witness: Goldman had a sliding scale with a minimum of of 25 per cent, Viking had a first week minimum of 50 per cent and a second week minimum of 40 per cent. On the Goldman the second week was a minimum of 25. The third week with the Viking was 30 and the Goldman was 25.

By Mr. Goffman:

Q. I ask you to look on the third page of your offer and to see if there isn't a page there called Viking Theatre Scale?

(4142)

A. Yes, sir.

Q. And that is a sliding scale, isn't it?

A. Yes, sir, it says so.

Q. All you are telling me is that the scales may have been different, but they were both sliding scales, weren't they?

A. No, what I am telling you is, regardless of the scale, the Viking, no matter what they grossed, the first week would have paid 50 per cent of the gross as film rental, as opposed to 25 per cent for Goldman. All he had to pay was 25 per cent of the gross receipts on this scale.

Q. No, he didn't, he might have had to pay 50, depending on where the picture reached.

A. Right, sir.

Q. All right. And you had a provision in yours for a three-week run, limited.

A. Yes, sir.

Q. And Goldman's offer was an indefinite run, at the discretion of the distributor?

A. Right, sir.

Q. Now, based on that term alone, the indefinite run, the discretion of the distributor, haven't we agreed in this case that that is a desirable offer from the standpoint of the distributor?

(4143)

A. All things being equal only.

Q. Yes, all things being equal.

A. Yes, sir.

Q. All right. So that don't you think the Warner distributor was making what in its own mind was its honest judgment in accepting the bid for the Goldman Theatre which had such a term in it, counterbalancing it against the other terms that you think were better from your standpoint?

A. Definitely not. The 50 per cent is twice as good as the 25 per cent. The least they could get from either first week is 50 per cent.

Q. But that would really depend on how much you grossed, wouldn't it?

A. If they grossed $2 they knew I was going to pay them more.

Q. But if they grossed a higher amount they could get up to 50 per cent.

A. 50 per cent Mr. Goldman, $31,000 gross.

Q. And nobody knew at the time the picture was awarded what that gross would be.

A. Well, you told me it was a small picture.

Q. Well, did anybody know what the gross would be before it was awarded?

A. No, sir.

(4144)

Q. Now, isn't this another picture where based on its actual performance by your calculation you would have lost money?

• • •

The Witness: Just about break even.

By Mr. Goffman:

Q. Just about break even?

A. Yes, sir.

Q. Now, have you made any provision there for teaser advertising, in your calculation just now, Mr. Wren?

You can answer that.

A. No, sir, I have not.

Q. You have not?

Now, in your bid you did provide the distributor was to pay all the teaser advertising?

A. Yes, sir.

Q. So that in your experience on teaser advertising that runs around $1,500, doesn't it?

A. Not necessarily, it may run $200.

Q. Look at your schedule.

(4145)

A. Look at my schedule?

Q. Yes, your schedule of advertising, Exhibit A. On PRODIGAL your teaser was $2,400, isn't that right?

A. Yes, sir.

Q. On LAST TIME I SAW PARIS it was $2,000, right?

A. The distributor was spending this money, yes, sir.

Q. Right. And here you required him to do the same.

A. No, if he ran that he was to pay for it.

Q. Your bid required the distributor to pay for advertising of a teaser?

A. Distributor to pay for all teaser ads. If he wants to run them he pays for them.

Q. On GRAY FLANNEL SUIT you spent $2,000?

A. No, we didn't, the film company spent $2,000.

Q. I mean the film company.

A. Yes.

Q. GLASS SLIPPER $1,900?

A. Yes, sir.

Q. So that $1,500 is not a high figure for teaser advertising?

A. If they spent it, no, sir.

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(4147)

Q. Mr. Wren, that $1,500 for teaser advertising you never included in any of the calculations you made on this picture until I just now called it to your attention, is that right?

A. That is right, sir.

Q. So that here again, by the failure of Warner Bros. to award this picture to you, where you would have just about broken even, they gave you no great injustice, did they?

A. Yes, sir, because they awarded it to a man who gave nothing for advertising and gave them nothing but 25 per cent.

Q. All right. Well, now, let us see whether they did or didn't. I guess we will have to make this calculation again.

The Court: What is teaser advertising, Mr. Wren?

The Witness: Sometimes, sir, they run an ad—TOWARD THE UNKNOWN—with no cast, nothing, and our position has been on that—and Metro especially never charges. It is just a—coming soon. You have seen the small type of advertisements. And since they don't list casts, invariably don't list casts, they call them teaser

(4148)

ads, to whet the appetite, the interest of the public in the picture.

The Court: In other words, they give the name of the picture, but they don't give the cast.

The Witness: That is right, sir. Coming soon. Watch for.

By Mr. Goffman:

Q. Mr. Wren, can't we illustrate that a little more; sometimes the teaser does not have the name of the picture on it, it may have a head on it that gets larger each day on successive days, and on the third day they might have the name of the picture.

A. That is right. It might vary.

Q. It is an attraction to whet the appetite of the public to come see the picture.

A. Yes, sir, as I indicated.

Q. All right. Well, this is TOWARD THE UNKNOWN, the Goldman, 1,200 seats, is that right?

A. Yes, sir.

Q. Total gross $19,011, is that right?

A. No, sir, $17,970.

Q. I am sorry, $17,970.

Now let's get back to the Viking. What was the picture that had the nearest gross over $17,970? Was

(4149)

that LUCY GALLANT, which was $19,010?

A. No, I would say it was COMANCHE with $16,075.

Q. This is $18,000, isn't it?

A. Yes.

Q. You have to get over that figure on a percentage, don't you?

A. Do we have to get over?

Q. Don't we have to get over?

A. Not necessarily.

• • •

Q. LUCY GALLANT was $19,010 at the Viking, wasn't it?

A. Yes, sir.

Q. Now let us do a little arithmetic.

(4150)

A. Yes, sir.

Q. Isn't that closer than COMANCHE to this figure?

A. You are going to like it better, and I will agree with you.

Q. It is closer.

A. No, it is not, but it will prove your point.

Q. Let us figure it out. $19,010, subtracting $17,970, gives us $1,040?

A. Yes, sir.

Q. That is $1,040?

A. Yes, sir.

Q. Right.

A. Now we have $16,075 on COMANCHE.

Q. $16,075?

A. Yes.

Q. On COMANCHE?

A. Yes.

Q. $17,970, that is $1,895, is that right? So this is closer, isn't it?

A. Yes, sir.

Q. All right. How long did it take you to play LUCY GALLANT, three weeks?

A. Yes, sir.

Q. Give me your weekly gross on LUCY GALLANT.

(4150a)

A. $7,867.

• • •

Q. $7,867?

A. $6,775.

Q. $6,775?

A. And $4,369.

(4151)

Q. And that total is a little higher. Now we have to knock off that $1000 to come out the same, to calculate the film rental, don't we? So we have to reduce this to $3,328. We reduced the third week from $4,369 to $3,328 and come out to $17,970, is that correct, Mr. Wren?

A. But that is the first one you have done that with.

(4152)

Q. Mr. Wren, this is the first picture where we made this calculation which was not a 90/10 deal or an 80/20 deal, isn't that right?

A. Yes, sir.

Q. Therefore we have to calculate the film rental a different way, week by week, don't we?

A. Yes, sir.

Q. And in order to make this gross exactly as it was at the Goldman, of $17,970, we have to make some adjustment in the last week of your engagement, don't we?

A. If you wish.

Q. All right. And you did that when you made your calculation on the pictures that Mr. Nizer talked to you

about. Remember you rounded off the last week in order to come out even?

A. On $315,000, yes, sir, I remember that.

Q. All right, so we are doing the same here.

Now, your percentage was—

A. 50 per cent.

Q. —50 per cent of the first week?

A. Yes, sir.

(4153)

Q. 40 per cent the second?

A. 40 per cent the second and 30.

Q. And 30 the third.

All right. Now, follow my mathematics, will you?

I get 50 per cent of this, of the first week, to the $3,938 film rental. Is that right?

A. Yes, sir.

Q. And I get the second week 40 per cent to be $2,710. Is that right?

A. All right, sir.

Q. And I get the third week, 30 per cent to be $998; is that right?

A. All right, sir.

Q. That is a total film rental of $7,646; is that right?

A. Yes, sir.

Q. Now, you were going to pay half of the advertising on this picture, weren't you?

A. Plus.

Q. Plus, all right. Now let's see what half of the advertising is with your plus.

What was your total advertising budget on LUCY GALLANT?

(4154)

A. $7,344.65.

Q. $7,345. Now, do you recall what it is by weeks?

A. No, sir, I do not.

Q. All right, maybe I can help you on that.

Your first week of LUCY GALLANT was an advertising figure of $5,709. Will you accept that?

A. Yes, sir.

Q. Does that sound right?

A. I will accept it, sir.

Q. All right. Now, according to your bid the top that the exhibitor would pay the first week at the Viking was $2000. That is in your bid for TOWARD THE UNKNOWN, is that correct?

A. Just a moment, sir.

Q. Didn't you have a total of $2000?

A. Yes, sir.

Q. All right. So that the distributor would pay $3,709 that first week, right?

A. Yes, sir.

Q. For the second week your advertising on LUCY GALLANT was $990, all right?

A. Right, sir.

Q. Of which you paid $690, is that right?

A. How can I pay $690 with that, sir?

(4155)

Q. Well, you paid your $300 budget, is that correct?

A. That's right.

Q. Plus half of the excess?

A. Yes, sir. That would be $600. Take three from nine leaves six and divide it by two.

Q. All right, 600. You are right about that. And the distributor would pay—so this is 900. 990. That is where we made that mistake. This is 990 for the second week. You would pay—how much did you say?

A. I would pay first a house budget of $300, leave you $690. Then I would pay $345 on top of that.

Q. That is $645?

A. 645.

Q. And the distributor would pay $345, is that right?

A. Yes, sir.

Q. For the second week.

Now the third week on LUCY it was $644?

A. But TOWARD THE UNKNOWN only played one day of the third week.

Q. But it took you three weeks to make this gross, didn't it?

A. No, not to make $3,328 it didn't take me that.

Q. How much less? Do you want to forget about the third week's advertising altogether?

(4156)

A. No, I don't want to forget it.

Q. All right, let's forget about it. So that the distributor would have paid an advertising just for two weeks, although you played it longer, $4,054, is that correct?

A. Yes, sir.

Q. Now we subtract that from this film rental. That leaves available $3,592 for film rental, is that right?

A. That is what the Viking paid, yes, sir.

Q. Now just a moment. Now we haven't paid for the teaser yet.

A. Oh, please. You didn't run any.

Now, Mr. Wren, your bid to the distributor required the distributor—

A. No, it did not.

Q. Will you read that sentence.

A. I certainly will.

Q. Will you read the sentence?

A. "Distributor to pay for all teaser ads."

Q. Right. And we agreed that $1500 was a fair estimate of what you paid for teasers?

A. Did you run any teaser ads on TOWARD THE UNKNOWN?

Q. Just answer my question. We agreed—

Mr. Sawyer: No, he would like to know. I think that is a quite legitimate question. Were there any?

(4157)

A. If there were any run you would have paid for them.

• • •

By Mr. Goffman:

Q. We have agreed in prior testimony—I don't want to repeat it—that $1500 was a fair figure for a teaser. You spent over $2000, $2400, that the distributor reimbursed you on teasers, isn't that right?

A. I have never spent a dime for a teaser ad, sir.

Q. They have reimbursed you up to $2400?

A. When they ran them, yes, sir.

Q. So in this case if we deduct $1500 for the teaser we wind up with a net film rental to the distributor of $2,090, is that correct?

A. Right, sir.

Q. How much did you testify was received by Warner Brothers from the Goldman Theatre for its engagement of TOWARD THE UNKNOWN?

A. $2,109.51.

Q. Which is about even?

A. Yes, sir.

Q. About the same?

(4158)

A. Yes, sir.

• • •

(4199)

Q. Mr. Wren, let us turn next to the picture THE BAD SEED. That played at the Mastbaum Theatre?

A. Yes, sir.

Q. 4,000 seats?

A. Yes, sir.

Q. And its total gross for the engagement was what?

A. $91,564.46.

Q. (Writing on the blackboard). This was a picture on which you made a bid?

A. Yes, sir.

Q. Is that correct?

A. Right, sir.

Q. And the Mastbaum Theatre also made a bid?

A. I believe that is right. Yes, sir.

Q. And both bids were rejected?

A. Yes, sir.

Q. And that is certainly equal treatment to both you and the Mastbaum, when they are both rejected, isn't it?

A. Yes, sir.

Q. May we therefore disregard those original bids both by you and the Mastbaum, because that was not the basis on which this picture was licensed.

A. No, sir.

(4200)

Q. You are agreeing with me?

A. Yes, sir, it wasn't licensed on that basis.

Q. Right. Therefore we can also reject those two bids and talk about what followed after that, is that right?

A. On the offer that I submitted as opposed to the offer they submitted, yes, sir.

Q. Right. Now, after the bids were rejected the distributor negotiated with you?

A. Yes, sir.

Q. And the distributor negotiated with the Mastbaum?

A. I assume, yes, sir.

Q. And both of you made additional offers?

A. Well, I know I did. I assume they did too.

Q. Well, you know that. Didn't you make a computation of film rent based on the second offer that the Mastbaum made?

A. Yes, sir, but I say I wasn't there at the time the Mastbaum submitted their offer.

Q. That is right, but you know that they made one?

A. Yes, sir.

Q. And isn't it a fact that the offers had certain similarities and certain differences between them?

A. I would say they had certain differences, yes, sir.

Q. Now, why don't we, in order to save a lot of time go

(4201)

immediately to our computation on this picture.

(Writing on the blackboard.) What was the picture that the Viking Theatre played that had the closest amount of gross receipts for its total engagement to the $91,500 that THE BAD SEED grossed at the Mastbaum?

A. Frankly, I don't see anything near that, sir.

Q. Wasn't THE LAST TIME I SAW PARIS very close to that?

A. Yes, sir, $93,415, right, sir.

Q. $93,415.

Now, will you give me again the grosses week by week of THE LAST TIME I SAW PARIS at the Viking?

A. $17,432 the first week.

Q. Yes?

A. $11,296 the second week.

Q. How much the second week?

A. $11,296.

Q. Thank you. The third week?

A. $15,630.

Q. Yes?

A. $11,163.

Q. Yes?

A. $97,086.

Q. Ninety-seven hundred?

A. I mean $9,786.

(4202)

Q. Yes?

A. $9,023.

Q. Yes?

A. $8,817.

Q. Yes?

A. $5,810.

Q. Yes?

A. And $4,456.

Q. Now, to make the same adjustment for the ninth week to come out even on the gross we have to reduce that to $2,605, isn't that right?

A. I don't know. I have never made this computation, sir.

Q. All right. Do you want to add this with me and see whether this comes to $91,564?

A. I will take your word for it, to save time, sir.

Q. All right, fine. $91,564. Now, I have applied, and you follow me, the sliding scale that you offered on this picture, to compute the film rental that the Viking would have earned on this picture, and will you follow me and see if I am right.

I have 50 per cent the first week.

A. Yes, sir.

Q. Which comes to $8,716.

Mr. Sawyer: Here is the Viking offer.

(4202a)

The Witness: Thank you.

By Mr. Goffman:

Q. (Continuing) 40 per cent the second week, which comes to $4,518.

• • •

(4203)

Q. I am taking the second offer that you made when you negotiated with Warner Brothers.

A. Yes, sir.

Q. The terms that you offered to pay them for the engagement of THE BAD SEED.

A. Yes, sir.

Mr. Sawyer: And what are you applying?

By Mr. Goffman:

Q. And applying those terms to the grosses that were earned in fact by the Viking for the picture which is closest in total gross for the engagement. Do you follow me?

A. In the total gross, in other words, at the Viking Theatre, in 8½ weeks. We grossed $91,564.

Q. And I am applying to that the terms that you offered the Mastbaum for BAD SEED. Do you understand that?

A. Against these grosses?

(4204)

Q. Right.

A. Yes, sir.

Q. Now, 40 per cent for the second week is $4,518.

42½ per cent the third week. Am I right, Mr. Wren?

A. Yes, sir.

Q. That is $6,643.

32½ per cent the fourth week. That is $3,628, am I right, Mr. Wren?

A. Yes, sir.

Q. And the fifth week was 27½ per cent?

A. Yes, sir.

Q. And that is $2,691.

The sixth week is 27½ per cent?

A. Yes, sir.

Q. And that is $2,481, is that right?

A. Yes, sir.

Q. And the seventh week, eighth week, and the final week are each 25 per cent, is that right?

A. Yes, sir.

Q. And that would mean for the seventh week $2,204, for the eighth week $1,453 and for the final week $651.

Mr. Sawyer: It isn't a week, Mr. Goffman.

By Mr. Goffman:

(4205)

Q. Well, the final period, to make that $2,605, is that correct?

A. Right.

Q. And if we add all that together we get a film rental of $32,985. Do you accept my total on that?

A. Subject to check, surely.

Q. All right. That is $32,985.

Now, when you made the computation to which you testified you put in an advertising figure here and you deducted, that the distributor would have contributed to you in advertising, do you remember that?

A. Yes, sir.

Q. Do you mind if we use your figure this time?

A. $9,085?

Q. Yes, sir.

A. Yes, sir.

Q. You don't mind?

A. No, sir.

Q. All right. We will take your advertising figure, Wren advertising, $9,883, subtracted—

A. $9,085, sir.

Q. Excuse me, you are right. $9,085 leaves $23,900, roughly, is that right?

A. Yes, sir.

(4206)

Q. Now, the Mastbaum in fact paid $25,340, is that right?

A. Yes, sir.

Q. Which means that the Viking would have paid about $1400 or $1500 less on that computation?

A. Not according to my computation, sir.

Q. But according to this computation?

A. Yes, sir, according to your computation, yes, sir.

Q. All right. Now, when you made your computation you stated that the Viking offer, the second Viking offer, was $3500 more than the Mastbaum actually paid. Do you remember that?

A. Yes, sir, $3,542.49 more.

Q. Right. And by this computation where we have used the actual experience at your house with a picture of a total similar gross it is $1400 the other way, isn't it?

A. Of a total similar gross, sir?

Q. Yes.

A. Yes, sir.

Q. Right?

A. On your figures.

Q. Now, the difference of $3,500 on a total film rental of $32,900 is about 10 per cent, isn't it?

A. I misunderstood you.

Q. A difference of $3500 on a total film rental of $32,900

(4207)

is about 10 per cent, maybe 11 per cent?

A. It is less.

Q. How much is it?

A. 10 per cent would be $3200.

Q. Well, this is $3500 so it is a little more.

A. 10 per cent of this, sir, would be $3300.

Q. All right. And $3500 would therefore be 11 per cent?

A. Yes, sir.

Q. And $1400 the other way is about 3 or 4 per cent?

A. Yes, sir.

Q. Wouldn't you say that looking at these offers in advance it is pretty difficult for a distributor appraising all of the factors that go into it, playing time, advertising terms, the kind of theatre, everything else he wants to think of, to make a more accurate judgment than the difference that has been exhibited in the case of the BAD SEED?

A. No, sir. We had a $17,500 cash guarantee again, first and foremost, before they ever looked at anything else, that they were assured of no matter what anything was.

Q. And don't you think that with that only difference that you have mentioned, that guarantee, that a distributor is justified in believing—exen if you don't agree with him—that he is better off putting this particular picture in the 4000-seat Mastbaum instead of the 1000-seat Viking?

(4208)

A. No, sir, because the 4000-seat Mastbaum had to be torn down because they couldn't fill the 4000 seats, sir.

Q. But at the time this picture was awarded nobody knew what it would gross any place, did they?

A. No, sir.

Q. And wasn't it therefore a justifiable business judgment for a distributor to make, even if you don't agree with it?

A. No, sir.

Q. All right, you have told me that. Now just one more thing, Mr. Wren, and I will be finished.

We talked some this morning about teaser advertising and I would like to just straighten that out if I may. This is advertising that you said you have never paid for, the distributor has always paid it whenever it has been used, isn't that right?

A. Yes, sir, I think it is indicated here.

Q. In the testimony you gave this morning we talked about it in TOWARD THE UNKNOWN. Do you remember that?

A. Yes, sir.

Q. We also talked about it in the case of BRIGADOON?

A. Yes, sir.

Q. Where the teaser advertising was only $1,350 out of the total advertising of $15,617, isn't that right?

A. Yes, sir.

(4209)

Q. But it wasn't involved in any of the other pictures we used for comparison, was it?

A. I don't believe so, sir.

• • •

(4211)

RE-DIRECT EXAMINATION

By Mr. Sawyer:

(4215)

Q. Now, how many pictures in all of the ones of which we have made comparisons, Mr. Wren, did the top weekly gross at the motion picture house in which the picture actually played exceed the Viking's best weekly gross? How many instances did that occur?

A. With THE CAINE MUTINY, GUYS AND DOLLS and PICNIC.

Q. Now, do you recall, Mr. Wren, with respect to CAINE MUTINY on page 3638 on cross-examination you stated:

"A. I want to explain the fact that he did not have two offers in front of him. So he had the Viking Theatre offer with a guarantee as opposed to no written offer from the Randolph Theatre."

And Mr. Nizer said:

"Q. Well, we have been over the question with Mr. Rome, and I want to save time. They negotiated—but Columbia Pictures had no bid in the sense that everybody has to meet a deadline and put in his bid by 10:00 o'clock on a certain day. That was not the Columbia pattern.

"A. We did with Columbia. Columbia wrote us a letter telling us that within five days we were to advise them.

"They did have a time limit with us, sir.

"Q. The five days requested—do you want me

(4216)

to show you the letter? You had to indicate whether you are interested in negotiating. They have what is called competitive negotiations; isn't that correct, sir?

"A. Yes, sir, but with us it was in writing.

"Q. Yes. It wasn't with you in writing. You chose, did you not, in this case, to send in your offer in writing, but Columbia followed the practice of competitive negotiation. I would rather not repeat all of this. We have had it. Isn't that so?"

Mr. Nizer: You haven't put his answer in.

Mr. Sawyer: Do you want me to keep reading?

Mr. Nizer: No, give his answer. It is two words.

Mr. Sawyer: "Yes, sir, but—"

Mr. Nizer: "Yes, sir."

Mr. Sawyer: "Yes, sir, but—".

By Mr. Sawyer:

Q. Now I show you—these are exhibit numbers P-58, 59 and 60.

• • •

(4217)

Q. Now, to whom was this letter addressed, Mr. Wren?

A. It is addressed to Mr. Ted Minsky, Stanley Warner Corporation.

Q. All right. What is the date of it?

A. April 8, 1954.

Q. And to whom is this letter addressed?

A. Mr. George Beattie, William Goldman Theatres.

Q. The date?

A. April 8, 1954.

Q. And to whom is this letter addressed?

A. The Viking Theatre Corporation, dated April 12, 1954.

Q. And from whom are all three letters?

A. Lester Wurtele, the Branch Manager of Columbia Pictures Corporation.

(4218)

Mr. Sawyer: I would like permission to read these, Your Honor, to the jury. They have been admitted.

This is a letter dated April 8, 1954, to Mr. Ted Minsky, Stanley Warner Corporation, 13th and Arch Streets, Philadelphia, Pa

"Dear Ted:

"Please be advised that we are arranging to screen THE CAINE MUTINY in our Home Office on the 11th floor, 729 7th Avenue, New York City, on Wednesday, April 14, 1954 at 2:30 P.M.

"We would appreciate your attending the screening, but if for any reason you are unable to do so, please advise me not later than Tuesday morning.

"It will be necessary for you to advise us within five days after the screening if you desire to negotiate for this picture.

"Kindest regards.

"Very truly yours,

"L. H. Wurtle, Branch Manager."

This is a letter dated April 8, 1954, to Mr. George Beattie, William Goldman Theatres, 15th and Chestnut Streets, Philadelphia, Pa.

"Dear George:

(4219)

"Please be advised that we are arranging to screen THE CAINE MUTINY in our Home Office on the 11th

floor, 729 7th Avenue, New York City, on Wednesday, April 14, 1954 at 2:30 P.M.

"We would appreciate your attending the screening, but if for any reason you are unable to do so, please advise me not later than Tuesday morning.

"It will be necessary for you to advise us within five days after the screening if you desire to negotiate for this picture.

"Kindest regards.

"Very truly yours,

"L. H. Wurtele, Branch Manager."

This letter is dated April 12, 1954, addressed to the Viking Theatre Corporation, S. E. Corner 19th and Chestnut, Philadelphia, Pa.

"Gentlemen:

"Please be advised that we are arranging to screen THE CAINE MUTINY in our Home Office on the 11th floor, 729 7th Avenue, New York City, on Wednesday, April 14, 1954 at 2:30 P.M.

"We would appreciate your attending the screening, but if for any reason you are unable to do so, please advise me not later than Tuesday morning.

(4220)

"Within five days after the screening, if you wish to make an offer for first-run exhibition on THE CAINE MUTINY, which is available for playdate on July 1, please do so in writing.

Kindest regards.

"Very truly yours,

"L. H. Wurtele, Branch Manager."

• • •

(4221)

Q. Now, Mr. Wren, do you recall being shown bids by a number of other theatres on PICNIC?

A. Yes, sir.

Q. And do you recall Mr. Nizer pointing out that your bid was not the best among those which were shown to you on cross-examination?

A. Yes, sir.

Q. Now, were any of the bids which Mr. Nizer asserted were better bids of theatres which actually played and got PICNIC?

A. No, sir.

Were you shown any bids during cross-examination on PICNIC from the theatre that actually got the picture?

A. No, sir.

Q. What theatre was that?

A. The Randolph Theatre.

Q. And did they make any bid on PICNIC?

A. Not to my knowledge.

Q. Now do you recall, Mr. Wren, that Mr. Nizer with respect to the picture BRIDGES AT TOKO-RI, I believe it was, asked you what experience Paramount had had previous to the time of bidding on that picture?

(4222)

A. Yes, sir.

Q. Do you recall citing to Mr. Nizer certain experience which Paramount had had at the Aldine Theatre?

A. Yes, sir.

Q. Do you recall Mr. Nizer pointing out two or three motion pictures that had had small grosses at the Aldine Theatre?

A. That's right, sir.

Q. Now, was there another Paramount picture that played the Aldine Theatre shortly before its close, Paramount?

A. The UNCONQUERED.

Q. What was the gross that UNCONQUERED earned at the Aldine?

A. I would have to check those figures, sir. I think it was ninety-some thousand.

(4223)

Q. What was the gross, their box office receipts, for the picture UNCONQUERED?

A. UNCONQUERED in 57 days grossed $126,514 and paid a film rental of $50,220.

Q. And do you recall Mr. Nizer also asking you about previous experience of Columbia in connection with CAINE MUTINY where he pointed out the theatre had been closed, previous experience of Columbia Pictures with the Viking?

A. Yes, sir.

Q. And with the Aldine Theatre?

A. Yes, sir.

Q. Was there any other picture that was not mentioned, a Columbia picture that played the Aldine Theatre shortly before its close?

A. Yes; the picture JOLSON SINGS AGAIN.

Q. And what was the gross on that motion picture, Columbia?

A. I will have to ask for that again.

In 84 days it grossed $145,616 and paid a film rental of $73,446.

Q. Now, Mr. Wren, do you have up there with you these calculations that were worked out yesterday afternoon? Do you have this sheet?

A. No, sir. I do not.

(4224)

Q. Just a minute. Look at those. Now, do you recall, Mr. Wren, an extensive comparison on the blackboard between the performance of the Viking Theatre on the motion picture NOT AS A STRANGER—

A. Yes, sir.

Q. —and the performance of the Randolph on the motion picture CAINE MUTINY?

A. Yes.

Q. Now, was there another motion picture that played during the period of suit at the Randolph Theatre, the national gross of which at $7.3 million was almost identical to the national gross of CAINE MUTINY?

A. Yes, sir.

Q. And what was that picture?

A. BATTLE CRY.

Q. Now, do you have up there the weekly grossing figures of the motion picture BATTLE CRY?

A. I do.

• • •

(4226)

Q. Now, Mr. Wren, we are all familiar with these grosses here, I think, on STRANGER. Let me put down in round figures per week; and when I say, "round figures," Mr. Wren, will you check me that what I am—

A. Right, sir.

Q. I am not taking the round figures; I am just knocking off the additional.

(4227)

A. Right, sir. That should be 11,000, sir, and the next one ten.

Q. Now, the national film rental of STRANGER, Mr. Wren, was what?

A. Six one.

Q. And the national film rental of BATTLE CRY?

A. Seven three.

Q. Seven three, and this played, BATTLE CRY, at the—

A. Randolph Theatre.

Q. Randolph Theatre. Is that the well-known 2,000-seat Randolph Theatre?

A. Yes, sir.

Q. And what was the—I see; yes—now I am going to put down figures here, Mr. Wren, if this is correct. Did you compute what the cumulative gross was on these?

A. Yes, sir.

Q. On this basis?

A. Yes, sir.

Q. In other words, what the total gross was for the first two weeks, total gross for the first three, and so on?

A. Three, four, and so on; yes, sir.

Q. And will you check me—maybe it will save time if I—was the first week's 59,000?

A. Yes, sir.

(4228)

Q. For the first two weeks. Excuse me.

A. Yes, sir.

Q. And 77,000 cumulative for the first three weeks?

A. Right, sir.

Q. 94,000 cumulative for the first four weeks?

A. Right.

Q. And so on?

A. Yes, sir.

• • •

Q. 119 was missed. I just left it out. Now, taking the motion picture BATTLE CRY, $7.3 million national gross, compared with STRANGER with 6.1, what was the cumulative—what was the cumulative receipts of the first two weeks at the Randolph?

A. 61,000.

Q. First week?

A. 79,000, 95,000, 109,000, 120,000, 126,000.

• • •

(4229)

Q. What is the largest—what is the largest motion picture house in the City of Philadelphia or was during this period of suit?

A. The Mastbaum Theatre.

Q. 4300 seats?

A. Yes, sir.

Q. I am just going to clean this up a little, if I may.

Now, what was the biggest motion picture in terms of national film rental that the Mastbaum Theatre ever showed during the period of the suit?

A. MR. ROBERTS.

• • •

(4240)

Q. What was the next picture, Mr. Wren, in order of national film rental, that the Mastbaum played during the period of the suit?

• • •

A. THE HIGH AND THE MIGHTY.

Q. What was the national film rental on that?

A. Five million three, sir.

Q. (Writing on the blackboard.) Do you have there the first week's gross?

A. Yes, sir. The first week of THE HIGH AND THE MIGHTY was $34,718.

Q. The second week?

A. $16,197.

Q. The third week?

A. $11,218.

Q. The fourth week?

A. $4,037.

Q. Do you have the cumulative gross for the first two weeks?

A. $50,915.

Q. And for the first three weeks?

(4241)

A. $62,133.

• • •

Q. This $50,000 here corresponds to what figure here (indicating)?

A. The $59,000.

Q. And this $62,000 figure here corresponds to what figure for the Viking on NOT AS A STRANGER?

A. $77,000.

Q. What was the opening date of NOT AS A STRANGER?

A. June 30, 1955.

Q. June 30, and what was the opening date of THE HIGH AND

(4242)

THE MIGHTY at the Mastbaum?

A. The year before, the same date. June 30, 1954.

Q. June 30?

A. Yes, sir.

Q. These three weeks then were exactly the same time of the year?

A. Yes, sir.

• • •

(4247)

Q. Now, you recall, Mr. Wren, being cross-examined on the motion picture in your comparison there of BAREFOOT CONTESSA?

A. Yes, sir.

Q. Do you have the sheets for BAREFOOT CONTESSA there in front of you?

A. Yes, sir.

Q. Do you recall that Mr. Nizer pointed out that the availability for that motion picture was the end of October?

A. Yes, sir.

Q. And the time of availability offered in your bid was December?

A. Yes, sir.

Q. When did the motion picture actually close at, what was it, the Randolph?

A. The Midtown Theatre.

Q. (Continuing) At the Midtown Theatre; when did it close its run?

A. It completed the engagement on the 25th of December, 1954.

Q. And under your bid through what period of the year would BAREFOOT CONTESSA have played?

A. Right through Christmas, New Year's Eve and the New Year's period, the most important playing time.

(4248)

Q. Now, Mr. Wren, do you remember a comparison that was made by myself and later on cross-examination by Mr. Nizer between the Randolph's performance on THE BRIDGES AT TOKO-RI, and the Viking's performance on other motion pictures?

A. Yes, sir.

Q. Now I invite your attention to the motion picture THE MAN IN THE GRAY FLANNEL SUIT at the Viking.

• • •

A. Yes, sir.

Q. Now, what was the gross of the Randolph in five weeks of BRIDGES?

A. $90,000.

Q. What was the national film rental of BRIDGES?

A. $4,300,000.

Q. What was the gross of the Viking on the first five weeks of MAN IN THE GRAY FLANNEL SUIT?

A. $81,000.

Q. What was the national film rental of that motion picture?

A. $3,600,000.

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(4250)

Q. Mr. Wren, do you recall that Mr. Nizer cross-examined you with respect to the advertising clause on the motion picture TEA AND SYMPATHY?

A. I do.

Q. Do you recall that Mr. Nizer—this is page 4028—asked:

"Q. And for the plaintiff you only subtracted $2,753 instead of $6,000, didn't you? That is an inadvertent error, I take it, is it not?

"A. No. Now wait a minute, please, sir. Under our bid—"

You were looking at your bid?

A. Yes, sir.

Q. " 'The exhibitor to place and pay only for the entire cost of the following advertising'—

"You are right, it is a mistake, sir."

A. That's right.

Q. Now, have you subsequently examined that bid in the

(4251)

interim?

A. Yes, sir.

Q. And that bid, Mr. Wren, if I may have it—attention was invited to the fact that there were four pages of advertising?

A. Yes, sir.

Q. Now, under that bid as to those four pages of advertising here, does that set out certain amounts to be spent for advertising?

A. Yes, sir.

Q. And under your bid who is it, now that you have reexamined it, who is it that is to spend those amounts for advertising?

A. The exhibitor or Viking Theatre was offering to pay for $3500 worth of advertising over and above the guarantee of $27,500.

Q. All right. Now just one further thing.

On the motion picture McCONNELL STORY, which Mr. Goffman just cross-examined you about, do you recall with that and other motion pictures he took the motion picture that had the closest gross at the Viking Theatre?

A. Yes, sir.

Q. Now, what is the motion picture during the suit that

(4252)

played at the Viking Theatre which has the closest national film rental to the McCONNELL STORY?

A. THE PRODIGAL.

Q. And on THE PRODIGAL—well, first of all, where did the McCONNELL STORY play?

A. At the Randolph Theatre.

Q. The 2000-seat Randolph Theatre?

A. Yes, sir.

Q. Now, what was the national gross of the McCONNELL STORY, so we have it?

A. $2,223,000.

Q. What was the national film rental of THE PRODIGAL?

A. $2,181,000.

Q. What was the gross of the Viking on THE PRODIGAL and the gross of the Randolph on the McCONNELL STORY?

A. The first two weeks, $34,000 on THE PRODIGAL at the Viking and the first two weeks $24,000 on the McCONNELL STORY at the Goldman's Randolph.

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(4264)

TWENTY-SIXTH DAY

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(4266)

Mr. Sawyer: I mentioned yesterday that we had not reached an agreement on certain figures. Counsel and I now have reached an agreement and I have no redirect examination of Mr. Wren on that subject. I will make no motion to strike with respect to the box office statistics of the Randolph.

The Court: Very well.

Mr. Nizer: Do I understand then that the figures which I gave you which you were to check on those boxoffice receipts are accepted?

Mr. Sawyer: They are accepted.

• • •

JAY WREN, recalled.

RE-CROSS-EXAMINATION

• • •

(4267)

By Mr. Goffman:

Q. Mr. Wren, in your redirect examination yesterday Mr. Sawyer asked you about the national film rent on THE McCONNELL STORY, and then asked you to compare it with PRODIGAL, with the closest national film rent picture that was played at the Viking. Do you remember that?

A. Yes, sir.

Q. I would like to ask you to make the same comparison with SERENADE. What was the national film rent of SERENADE which played at the Goldman?

A. (No answer)

Q. May I give you the figure?

A. Surely, yes.

Q. $1,053,000.

A. $1,053,000.

Q. Do you accept that as correct?

A. Yes, sir.

Q. Now, what was the picture that played at the Viking that had the nearest national film rent to $1,053,000?

A. I would have to check that, sir.

Q. Now, I have it as SECOND GREATEST SEX, which had a national film rent of $1,048,000. Will you accept that?

(4268)

Mr. Sawyer: That is right.

By Mr. Goffman:

Q. SECOND GREATEST SEX played at the Viking a total of three weeks for its entire engagement, didn't it?

A. Yes, sir.

Q. And what was the total gross received by the Viking during those three weeks?

$20,186.

Q. Now I would like you to look at the engagement of SERENADE at the Goldman, and will you tell me what it grossed at the Goldman for the first three weeks of its engagement?

Mr. Sawyer: Why don't you give it to him.

The Witness: Yes.

By Mr. Goffman:

Q. SERENADE at the Goldman for the first three weeks of its engagement, I make it $48,559.40.

Do you accept that?

A. Yes, sir.

Q. And for the total engagement of SERENADE at the Goldman it was $61,903.

Do you accept that?

A. Yes, sir.

Q. Whereas SECOND GREATEST SEX'S total engagement at the Viking was $20,186.

(4269)

A. Yes, sir.

• • •

By Mr. Wolf:

Q. Yesterday you testified to the grosses at the Mastbaum Theatre on certain pictures compared with NOT AS A STRANGER.

A. Yes, sir.

Q. (Continuing) In the early weeks there.

A. Yes, sir.

Q. I would like to put on the record with your approval the following figures of other pictures that played at the Mastbaum, and the grosses those pictures earned during their first week at the Mastbaum:

CONQUEROR, national film rental $3,659,000.

Gross, first week, $34,065.

Unless you correct me I will assume you will agree with the figutes.

A. Go ahead, sir.

Q. A STAR IS BORN, national film rental $4,340,000.

First week at the Mastbaum $37,335.

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(4270)

Q. TWENTY THOUSAND LEAGUES UNDER THE SEA, first week at the Mastbaum, $43,837.

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(4272)

By Mr. Rome:

Q. Mr. Wren, similarly yesterday in response to a question by Mr. Sawyer, which appears at page 4215 of the notes, you were asked in how many instances there were films that played at the Goldman Theatres in which the gross exceeded the top gross which you had earned on the first week of NOT AS A STRANGER. Do you recall that testimony?

A. Yes, sir.

Q. And you mentioned three films that were thus involved: CAINE MUTINY, GUYS AND DOLLS and PICNIC.

A. Yes, sir.

(4273)

Q. Am I correct in thinking that by reference to those three pictures you did not intend to say that only in the instance of the first week of those pictures was there a larger gross earned or received at the Randolph than NOT AS A STRANGER'S first week?

A. No, sir.

Q. In other words, it is the fact, is it not that, for example, in CAINE MUTINY there were two weeks in which the gross receipts at the Randolph—

A. Yes, sir.

Q. —were higher than—

A. Yes, sir.

Q. —your receipts?

And similarly, with GUYS AND DOLLS there were three weeks —

A. Yes, sir.

Q. —with receipts ranging from $58,000 to $43,000?

A. Yes, sir.

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(4274)

By Mr. Nizer:

Q. Yesterday you addressed yourself to the subject of an 8:30 opening.

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. The one opening?

A. Yes, sir.

(4275)

Q. And you said that you were the innovator of that practice which has since been copied; do you claim that, sir?

A. Yes, sir.

Q. And therefore you showed some advertisements in 1961.

Now, don't you know, Mr. Wren, that the practice on certain pictures of opening at 8:30 has gone back to the 1940's?

A. No, sir, I did not know that.

Q. Well, let me show you a year before you opened at 8:30—I show you this boxoffice report of one of your competitors with tickets sold between 8:30 and 9:00, and ask you if you won't acknowledge that that is not a practice that you originated?

A. Yes, sir.

Q. Will you take back your claim then?

A. Yes, sir.

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(4276)

Q. Now I ask you, in order to make clear my question: Wasn't that an extraordinary situation at the Viking? In other words, you didn't customarily open up at 8:30 in the morning?

A. No, sir. But you were concerned about women and children being there so early, sir.

Q. No, no. I was concerned about them, but not in connection with going to a motion picture.

My question to you is: Don't you agree that the opening at 8:30 was a very extraordinary practice for the Viking?

A. Yes, it was the first picture at the Viking that opened at 8:30 in the morning, yes, sir.

Q. Not only the first, but maybe in only one or two other instances in the entire history of the suit has the Viking ever opened at 8:30; is that right?

A. FLANNEL SUIT. I believe you are right. A couple of more pictures, probably.

Q. Haven't you testified that this was an extraordinary situation where you were able to take in patrons beginning at 8:30 in the morning?

A. Yes, sir.

Q. Now, your counsel showed you on this re-redirect some

(4277)

letters on Columbia pictures. Do you remember one was April 12th, and that counsel read it to the jury, in which they invited you to negotiate, to send in in writing; do you remember that? Do you remember that letter of April 12?

A. I believe it had to do with CAINE MUTINY, did it not?

Q. Whatever it was. Perhaps. April 12, 1954.

Now, at that time your theatre wasn't open yet, was it, the Viking?

A. No, sir.

Q. Thereafter, after your theatre opened, didn't you receive from Columbia Pictures for every picture that came out a written invitation to let them know within five days whether you were interested in negotiating? Didn't you get such a letter?

A. Yes, sir.

Q. And on those letters, and I will not present them to you, those letters all simply said, let us know if you are willing to negotiate. It didn't ask you to put it in writing or not to put it in writing, is that right?

A. Not those particular solicitation letters that you refer to, no, sir.

Q. And by those particular I mean all of the Columbia invitations for you to negotiate on any pictures that came out during the period in suit after you were open.

(4278)

A. No, sir. In about the early part of 1956, I think if you will check—

Q. No, no.

A. Yes, sir, they started sending out solicitation forms, request for offer forms, or whatever it is known as, sometime in 1956 before the end of the suit, sir.

Q. I am told that that was 1957, and even then those were sent, the same to all exhibitors?

A. I assume, yes, sir.

Q. All right, then, it doesn't matter. My question is, assuming that you are in error about the date of it, here is the last letter, I have in my hand, October 11, 1956, the period of this suit; I think you will stand corrected on that, won't you?

Do you remember that picture?

A. Yes, sir.

Q. Well, then, all right. Now, will you agree with me that of all the Columbia pictures in which they notified you to negotiate, they simply invited you to negotiate, without specifying that you were to do so in writing or otherwise, correct?

A. In those instances other than CAINE MUTINY, yes, sir.

Q. Now, CAINE MUTINY, as I say, was before your theatre was opened?

(4279)

A. Yes, sir.

• • •

Q. This is my last question on this subject: That particular letter, the April 12th one, 1954, that Mr. Sawyer read to the jury, was after an attorney on behalf of Viking had written to Columbia before the theatre even opened, putting it in a lawyer's letter that they wanted to have pictures from Columbia; is that right?

A. Yes, sir.

(4280)

Q. Now your counsel referred on this re-redirect to BATTLE CRY and NOT AS A STRANGER, and I have only one or two questions about that.

In your comparison you compared NOT AS A STRANGER with BATTLE CRY. Now, you know, don't you, that United Artists spent $25,200 odd for advertising on NOT AS A STRANGER, that blockbuster?

A. Yes, sir.

Q. And you know that on BATTLE CRY Warner spent $4280, over $4000, and Goldman another $4500, or a total of less than $9000 as compared to $25,000. You have seen the records on that, have you not?

A. I believe that is right, yes, sir.

Q. Now, isn't it a fact, therefore, that each motion picture company, depending upon how it feels about the motion picture, the time of the year and the theatre it plays and the city and how it has happened to do in Chicago, whether it seems to be a good picture or is not drawing them in, each company determines the amount of advertising it will pour in behind that picture, correct?

A. I believe I have said that, yes, sir.

Q. And the amount of advertising which may be $25,000 against $9000 can also affect the box office receipts, of course? That is the purpose of advertising, is it not?

(4281)

A. As the $34,000 did on GUYS AND DOLLS.

Q. Yes. It had a lot of advertising?

A. Yes, sir.

Q. Do you agree with your counsel's statement which he made at page 4117 at the time that this was being gone into:

> Who knows what special considerations might have gone in which would have prompted the theatre, any theatre, to spend more or less on advertising on a particular motion picture.

That is true for the theatre; it can spend more in your judgment or less, is that correct?

A. Yes, sir.

Q. Therefore, when you compare pictures, one of the factors which of course affects the situation is the amount of advertising poured in either on the distributor's part or the exhibitor's part, right?

A. Yes, sir.

Q. Now only one other matter, sir. Your lawyer asked you yesterday about the Aldine, which was this Viking Theatre before it closed.

A. Yes, sir.

Q. And he asked you whether it isn't true that it had also large box office receipts rather than some of the small ones I gave you.

(4282)

A. Yes, sir.

Q. You recall that subject matter. And I think you testified that shortly before the theatre closed, the Aldine, closed, it played a picture UNCONQUERED at the Aldine and made a gross of $126,514. Do you recall that testimony?

A. Not shortly before it closed. That was 1948, sir. I don't think we specified the date.

Q. That is exactly the point, sir. Let me read to you what you said yesterday.

Mr. Sawyer: At what page?

Mr. Nizer: Page 4222.

By Mr. Nizer:

Q. Mr. Sawyer asks:

Q. Do you recall Mr. Nizer pointing out two or three motion pictures that had had small grosses at the Aldine Theatre?

A. That's right, sir.

Q. Now, was there another Paramount picture that played the Aldine Theatre shortly before its close, Paramount?

A. THE UNCONQUERED.

A. '49, 1949.

Q. And the theatre closed?

A. '52, I believe you said.

Q. '53. And the picture didn't play in '49. Will you accept my date of 1947, because I have the exact date.

(4283)

A. We have dates I belive that say '49, sir.

Q. No, it opened December 25, 1947, the exact date.

Mr. Steinberg will check that for you.

Incidentally, while we are checking that, to save a moment, now that we have agreed on that box office recipts thing, you know, 2,553 people in that two-hour series, there is no other matter that I gave you subject to check that you wish to object to at all? You have had an opportunity to check them, have you not?

A. Not that I can think of, no, sir.

Mr. Nizer: Have you confirmed that '47 date, Mr. Steinberg?

Mr. Steinberg: It opened on 12/25/47.

Mr. Nizer: '47.

Mr. Sawyer: But it played mostly in the year 1948.

Mr. Nizer: All right, December.

By Mr. Nizer:

Q. It opened in December. Let's say early '48.

A. Good, sir.

Q. So that would be five years before, not shortly before the Aldine closed; it would be five years, approximately, before the Aldine closed that that picture played at the Aldine?

(4284)

A. Yes, sir.

Q. You want to take back your prior answer and correct it, do you not?

A. I answered a statement of Mr. Sawyer's. If you would like it corrected, I will, yes, sir. In 1948.

Q. Don't you want it corrected?

A. Yes, sir. I indicated that, sir, before.

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(4342)

HARRY SLEY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Sley, what position if any do you hold with the plaintiff, Viking Theatre Corporation?

A. I am the president of the Viking Theatre Corporation.

Q. What is the ownership of that corporation?

A. My family owns all the stock in the Viking Theatre Corporation; my wife, my daughter, my son and I.

Q. When was the agreement of sale for the purchase of the property now known as the Viking Theatre Corporation signed?

A. Eight years ago.

Q. What date was it, do you recall, sir?

A. No, I don't recall exactly.

Q. Just a moment and I will produce that.

What had that property been prior to your acquisition of it?

A. A theater.

Q. And the name of that theater was what?

(4343)

A. The Aldine Theatre.

• • •

Mr. Sawyer: I ask to have this document marked.

(Copy of agreement of sale re Aldine Theatre, dated June 22, 1953, was marked Exhibit P-182 for identification.)

• • •

By Mr. Sawyer:

Q. Now, Mr. Wren, what was the date of the agreement of sale?

A. The agreement of sale was dated—

Q. Mr. Sley, excuse me. That is force of habit.

A. The 22nd of June, 1953.

(4344)

Q. Upon signing of that agreement of sale did you become the equitable owner of that property then and there?

A. Yes, sir, I did.

Mr. Wolf: Objected to. Obviously the agreement speaks for itself.

By Mr. Sawyer:

Q. What if anything is there stated in Paragraph 21 of that agreement?

A. The entire agreement between the parties is contained herein and there are no other agreements, understandings or conditions other than those expressly set forth in this contract.

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(4345)

Q. Now, Mr. Sley, as to the parties to this agreement, I invite your attention to the last numbered page of the agreement and ask you who the parties are on behalf of the seller. Who signed on behalf of the seller?

A. Harry Kalmine, the vice president of the Stanley Company of America.

Q. Who signed on behalf of the buyer?

(4346)

A. Henry Parker.

Q. Who is Henry Parker?

A. Henry Parker is a straw that is used quite frequently by myself when I make real estate deals through Greenfield's office.

Q. Is he an employee of the Greenfield office or building in some fashion?

A. I think he is the elevator operator. I have never met him.

Q. What is a straw, Mr. Sley?

A. A straw is a person that is used to acquire a building or a parcel of real estate so that you just don't have publicity connected with a deal that you make in the real estate field.

Q. Who selected that straw?

A. Greenfield's office selected that straw.

Q. Was it known that that straw was selected to act as a straw and an agent for you?

A. Yes, sir.

Q. Now, at the time that you acquired the property then known as the Aldine Theatre, what did you intend to use it for?

A. For a theater.

Q. Did you consider it could be operated profitably as a theater?

A. Yes, sir.

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(4349)

Q. Mr. Sley, you had been at that time a resident of the City of Philadelphia for how many years?

A. Well, I have been here since about 1920. I even watched the Aldine Theatre being erected and built.

Q. Were you at the time and at the time you purchased this the owner of any other theater?

A. Yes, sir. I bought the Locust Theatre at 52nd and Locust Street. . . .

(4350)

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Q. Did you know, Mr. Sley, any motion pictures in your recollection which showed at the Aldine Theatre?

A. Yes, sir. The first picture they showed there was THE THREE MUSKETEERS, and I remember that with Douglas Fairbanks.

I remember a picture called THE BIG PARADE. I remember THE TEN COMMANDMENTS played there. I remember THE ST. LOUIS BLUES or MEET ME IN ST. LOUIS played there. I remember AL JOLSON SINGS AGAIN. I remember UNCONQUERED and FOR WHOM THE BELL TOLLS, and THE SONG OF BERNADETTE.

There were so many of them that were there.

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(4364)

By Mr. Sawyer:

Q. Now, Mr. Sley, there is exhibited before Court and jury a large map of downtown Philadelphia.

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(4365)

Q. Now, Mr. Sley, just to be oriented here, that point designates what?

A. City Hall.

Q. And what street is this running down here?

A. Market Street.

Q. And what street is this?

A. Broad Street.

Q. And what street is this?

A. Chestnut Street.

Q. Now, first of all, where is the—do I point now to the —what theatre is that, Mr. Sley?

A. That is the Viking Theatre, 19th and Chestnut Streets.

Q. And what theatre is this orange here just to the westward of the Viking?

A. That is the Boyd Theatre less than a half a block away from the Viking Theatre.

Q. And in orange, Mr. Sley, is a designation for what theatres?

A. Stanley Warner Theatres.

Q. And this one here?

A. Mastbaum Theatre on Market Street.

Q. At what?

A. 20th. Stanley Theatre at 19th and Market Streets.

(4366)

Stanton Theatre on Market Street between 16th and 17th.

Q. And this theatre here, what is that?

A. That is the Fox Theatre at the corner of 16th and Market Streets.

Q. And now down here, these three theatres in blue, what are they?

A. That is the Goldman Theatres.

Q. And that one, sir?

A. That is the—that is the Goldman Theatre.

Q. And this one? I am sorry.

A. And that is the Midtown Theatre on Chestnut, and the other is the Randolph Theatre between 11th and 12th on Chestnut.

Q. Now, there are other theatres on this map?

A. Yes, sir; the World Theatre on Market Street in the 1800 block; the Trans-Lux in the 1500 block on Market Street; the Arcadia in the 1500 block on Market Street, closer to 16th; the Studio on Market Street near 17th.

Q. Now, Mr. Sley, are there public transportation lines on Chestnut Street?

A. Yes, sir. The transportation is by bus and is excellent.

Q. And are there transportation, public transportation lines, on Market Street?

A. Yes, sir. There we have a combination of bus system and a subway on Market Street.

(4367)

Q. And are there transportation lines, public transportation lines, on Walnut Street?

A. Yes, sir. We have the bus system on Walnut Street.

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(4368)

Q. Now, I am designating with my pointer, Mr. Sley, the area bordering Rittenhouse Square thus. Now, what sort of buildings, if any, are around that square?

Mr. Wolf: Objected to. We are not interested in, as it seems to me, with what buildings are there now; we are speaking about a time which is covered by the claims made in this suit.

By Mr. Sawyer:

Q. What buildings were there?

The Court: I will sustain it.

(4369)

By Mr. Sawyer:

Q. What buildings were there—

The Court: Then.

By Mr. Sawyer:

Q. —during the period in suit.

A. Well, there were a series of apartment houses and hotels in that vicinity: The Rittenhouse Plaza, and over at 19th and Walnut Street, the Rittenhouse Claridge; on 19th and Walnut Streets the Rittenhouse Savoy. There is 135 South 18th Street, which is an apartment house building. There is 230 South 18th Street, which is an apartment house building. There is 1900 Ritenhouse Square; that is an apartment house building; the Barclay Hotel at 18th Street below Locust; the Warwick Hotel on 17th and Locust Streets; the Warburton House at 20th and Sansom Streets; the Belgravia at Chestnut between 18th and 19th Streets.

Q. Very well.

A. There are a series of other apartment house buildings, and along Locust and Spruce Streets there are a series of fine residential homes, as well as on Pine Street.

(4370)

Q. Now, Mr. Sley, with respect to the Aldine Theatre at the time you purchased it, what was its physical condition at that time?

A. Well, it had been run down very badly—as a matter of fact, almost down to the nth degree. The carpeting was in bad shape. The seats were dilapidated. The toilet facilities were in very poor shape for both men and women. The tapestries that they had there or the furnishings were in very, very poor shape in every respect. The screen was a small moving picture screen. The fixtures for lighting were old-fashioned. They had no air-conditioning in it.

They used the old-fashioned oil burner with radiation coming through the walls

(4371)

for heating; and it had stadium type seats that were a sort of a step seat to get to instead of the present ramp-type seat...

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Q. Now, Mr. Sley, had you finished describing the condition

(4372)

of the Aldine?

A. Well, they had a marquee that was antiquated. There was a sign on top of the theatre building that was a neon sign, but really it was so small it almost looked like a peanut on a pumpkin. It just didn't seem to fit the picture at all.

• • •

Q. Well, were you familiar with the condition of the Stanton on Market Street at this time?

A. Yes, sir. I have gone to the Stanton a number of times. I am quite familiar with the Stanton.

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(4373)

Q. Well, what was wrong with the Stanton at this time, Mr. Sley?

(4374)

A. Well, the Stanton Theatre had been run down very badly, too.

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Q. And was the Stanton Theatre renovated during the period of this suit?

A. Yes, sir.

Q. And when was it renovated?

A. Towards, oh, I would say about August of 1956 or in September of '56.

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(4378)

Q. Have you run the Locust Theatre since 1946, Mr. Sley?

A. Yes, sir.

Q. And is the Locust Theatre still running?

A. Yes, sir.

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(4385)

Q. Mr. Sley, when was settlement had for the property?

A. On September 15, 1953.

Q. Now, what happened, if anything, with respect to the property after September 15, 1953?

A. Well, the Stanley Company kept a lot of their equipment in the place until the 30th of September, and after the 30th of September, beginning around the 1st or the 2nd of October, I decided to go into the premises and look it over to get ready for renovating the building.

Q. Yes.

A. And I sort of made a survey of the premises.

I thought we had better get rid of the stadium-type stairs that we had and put in a ramp.

I thought the most important thing would be to put in air-conditioning in the theater, that it had never had.

Q. Before we come to the renovations, Mr. Sley, were there any discussions with respect to the purpose for which you intended to use the property, and if so, with whom?

A. Yes, sir. Mr. Greenfield called me on the telephone—

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(4386)

Q. Mr. Greenfield called you?

A. Yes, sir.

Q. Had you talked to Mr. Greenfield prior to this time about this property?

A. No, sir.

Q. Pursuant to that telephone call was there a meeting with

(4387)

respect to the property?

A. There were several meetings with Mr. Fabian, and with Mr. Schlanger, and Mr. Cincotta, Mr. Greenfield and myself in Mr. Greenfield's office.

Q. Who is Mr. Cincotta?

A. Mr. Cincotta was executive vice president of Albert M. Greenfield and Company.

Q. With whom did you deal in the purchase of this property at the Greenfield Company?

A. With Mr. Chester Cincotta.

Q. All right. Now, with respect to that meeting or those meetings, what was the detail, and who said what? At any length, Mr. Sley, what was the subject at this meeting with Mr. Fabian, Mr. Schlanger, Mr. Greenfield, Mr. Cincotta, and yourself, and whoever was present?

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(4388)

The Witness: To begin with, Mr. Fabian was quite upset that we were going to operate it as a theater, and he wanted to buy the theater back, and we let him know that the theater was not for sale.

Then he wanted to lease it for 25 years.

And we have had several meetings on that and we weren't able to get together, and after that we decided to go through with our renovations.

By Mr. Sawyer:

Q. Now, in renovating the theater, Mr. Sley, what was done to the Aldine in the process of those renovations?

A. Well, first of all, we worked on our air-conditioning, and then we brought Philadelphia Steam Heat in in place of the old oil-burner system.

We cut down the stage. It was a larger stage, and there used to be an orchestra pit there, and we filled that in.

We put a ramp-type floor in.

We changed the lighting system and modernized it.

(4389)

We added two extra additional fire exits, one on each side of the building.

We redecorated it and put in special type curtains.

In general we modernized it, and we put a mirror in the back portion of the theater.

We put a windbreaker-type wall behind the rear seats so that if the doors were opened when people were coming in, that the wind draft wouldn't affect the people in back of their necks.

We used every modern device we could think of in modernizing the theater.

We changed the toilets over. We had a nice restroom for the ladies that we installed, and a powder room, and we put new carpeting in.

I made it a point to see that we put wider seats in than had been in there, and I personally went around to the various theaters to measure the space between the seats, and I didn't miss any of the theaters when I went around, and the one that I found that had space of about 37 to 38 inches in space between the front seat and the seat adjacent to it was the Boyd Theatre. They had about 37 to 38 inches, and I decided to put in a 40-inch space between them. So that people would be very comfortable when others were coming in or

(4390)

going out during the time that a picture was being shown.

We put our seats in at such angles on the sides so that anybody could see the screen from any point of the theater without getting a blur or without having it misfocused in their eyes.

We put in a new miracle mirror CinemaScope Fox screen, which was the latest type of screen that could be gotten. It was 56 feet wide. It was 28 feet high. The best that you could get for the theater at that particular time.

We left enough space between the front row and the screen so that sitting in the front row of the theater you would not have to stretch your neck to look at the screen, and from any part of the theater it is easy for anybody who is near-sighted or who has 20/20 vision to look at the screen and enjoy themselves.

And I thought that we had what was called an intimate theater because we put 960 seats on the first floor.

Mr. Wolf: Objected to. I think the witness should stop, because it is obviously the kind of testimony that is inadmissible. He is thinking about what he was doing.

(4391)

Mr. Sawyer: Well, I guess he said "I thought" during one part of that, Your Honor.

By Mr. Sawyer:

Q. All right, let's not have what you thought, Mr. Sley.

A. I didn't mean it in that respect. I suppose I used the wrong word, but—

Q. Well, let me ask you this. Of the 1017 seats in the Viking, how many now are on the first floor?

A. There are 950 seats on the first floor of the Viking Theatre.

Q. And in these theatres—well, strike that.

Are there first-run theatres in Philadelphia that have as many—which we have had testimony about here, de-

fendants' theatres—that have as many as half of their seats in balcony or second balconies?

A. Yes, sir. The Stanley Theatre would have.

• • •

(4392)

Q. Now, what steps, Mr. Sley, did you take, if any, to begin to procure or acquire pictures for exhibition at your theatre? What was the first picture that you had anything to do with in the theatre at all?

A. The first picture that I had anything to do with was a picture called CAINE MUTINY.

Q. No, but before that, Mr. Sley.

A. Before that there was a picture called JULIUS CAESAR, and a bid was put in on that picture sometime in October, but I knew that we wouldn't be ready with our renovations and no contract had ever been executed by us for that particular picture.

Q. Now, with respect to your planned opening, were any steps taken to notify the film companies that the theatre was opening, that the Viking would wish to have product?

A. Yes, sir. Sometime—

• • •

(4393)

Q. The question, Mr. Sley, was whether any steps were taken, and you answered yes. I will now ask you what steps were taken.

A. Well, sometime after the 1st of the year, probably around February or March, Mr. Manning and I had a talk with Mr. Lynch, and I told him that—

Q. Who is Mr. Lynch?

A. Mr. Robert Lynch was the District Manager of Loew's Metro-Goldwyn-Mayer, and—

Mr. Ward: Excuse me, Mr. Sley. We didn't catch the year to which you refer. Would you mind mentioning that? You say shortly after the first of the year.

The Witness: 1954.

Mr. Nizer: February or March, 1954?

The Witnes: Yes, sir. And we had a talk with Mr. Lynch, just talking about things in general, because we

(4394)

hadn't decided on any specific picture. And I told him what we had had in mind and Mr. Lynch said, "Well, why don't you send a letter to all the distributors to tell them that you would like to share products or that you would like to negotiate for product?"

By Mr. Sawyer:

Q. Did you do that?

A. Yes, sir. I decided instead of writing the letter myself that I would have my personal attorney, Mr. Straub, send out such a letter. And Mr. Straub sent a letter to the various distributors in the early part of April of 1954. And in some instances we got responses from them and in other instances we did not get responses from them.

• • •

Q. Now, Mr. Sley, what was the next picture—what was the picture then that you first sought for the opening of the Viking?

A. The first picture that we sought for the opening of the Viking was a picture called THE CAINE MUTINY.

Q. Did you have an opportunity to screen that picture?

(4395)

A. Yes. We went to New York to see the picture screened and Mr. Wormsler, who is connected with the Columbia Pictures Corporation, had his secretary tell us that

he wanted to see us before we got to the screening of the picture and he said he wanted to talk to us after we had seen the picture.

We screened the picture and after we saw the picture we went back into Mr. Wormsler's office and Mr. Wormsler asked me what I thought of the picture and I said I thought it would be a fine picture, a great picture, and it should be the picture to open the Viking Theatre.

Mr. Ward: Could I interrupt, Mr. Sawyer, to ask who Mr. Sley means by "we" just so that we can follow his testimony?

By Mr. Sawyer:

Q. Yes. Who do you mean by "we," Mr. Sley?

A. Well, Mr. Manning was with me, Mr. Edward London, who is my nephew, who has since passed away, and I.

• • •

Q. Who was Mr. aMnning, Mr. Sley?

A. Mr. Manning was the General Manager of the Viking and

(4396)

Locust Theatre.

Q. When did he leave your employ?

A. Well, either the latter part of August or the early part of September. Oh, I think it was somewhere before Labor Day or the Friday following Labor Day. It was somewhere in that vicinity.

Q. Of that same year?

A. Of 1954. He was with us for just a little—at the Viking Theatre for just a little over two months after the theatre had been in operation.

• • •

Q. Did the Viking Theatre Corporation make a bid for the

(4397)

Columbia motion picture CAINE MUTINY?

A. Yes, sir.

Q. I show you two documents.

Did you make more than one?

A. Yes, sir, we made one bid and it was rejected and then we made a second bid.

Q. I show you two documents which have been respectively marked P-54 and P-55, and without reading them will you identify those two documents.

A. Yes, sir. One bid was made on April 23, 1954 to the Columbia Pictures Corporation and the other one was made on May 4, 1954.

Q. Do those two documents comprise the Viking bid?

A. Yes, sir.

Q. Now, these have been marked.

Just let me ask you this. Was there a guarantee offered by the Viking Theatre Corporation in either of those bids, and if so, what? And you may, if you want to, look at these.

A. We put a $44,000 guarantee on the first bid and that was rejected. And then we put a $60,000 bid in as our second—a $60,000 guarantee in as our second bid for the picture, and that, too, was rejected.

(4398)

Q. Now, to whom was that picture awarded, Mr. Sley?

A. That picture was awarded to the Goldman Randolph Theatre.

Q. Was there any guarantee offered by the Goldman Theatre?

A. No, sir, there was no guarantee offered by the Goldman Theatre. There was no bid. It was negotiation.

• • •

(4405)

Q. Now, Mr. Sley, what was the next picture that you attempted to license?

A. THE STUDENT PRINCE, a Loew-Metro-Goldwyn-Mayer picture.

Q. What were the circumstances of that licensing and what was your bid, if you made one?

A. Yes. We made a bid for the picture and after Mr. Manning had some negotiations at the Metro-Goldwyn-Mayer office, I met with some of the men—Mr. Lynch, Mr. Formato, Mr. Manning,

(4406)

Mr. London and I were present at this meeting—and I had quite a talk with Mr. Formato about the picture, on price, guarantee, as well as the advertising phase of the contract.

Q. What kind of terms did you offer, Mr. Sley?

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(4407)

By Mr. Sawyer:

Q. Now Mr. Sley, I show you a copy of a document which has, we believe, already been marked as P-88, and first let me ask you, what is that document?

A. That is a contract for the STUDENT PRINCE with a minimum guarantee of $40,000 against 90/10 per cent for the overhead expense on a figure of $4900 for a week as house allowance or expenses.

Q. And with whom is the contract?

A. The contract was with Metro-Goldwyn-Mayer Pictures.

Mr. Sawyer. All right.

This is a return receipt.

By Mr. Sawyer:

Q. Did this contract come to the Viking Theatre by mail?

A. Yes, sir. It came by registered mail.

Q. Is this the return receipt?

A. Yes, sir.

Q. That was the first contract that the Viking ever got, was it, sir?

A. Yes, sir.

• • •

(4409)

Q. Now, you have given us the terms of that contract, the exhibition of STUDENT PRINCE, and was that a 90/10 deal, did you say, over a house expense, house allowance?

A. Yes, sir; but there is nothing here in this part about the advertising.

Q. Well, just before we come to that, what was the house allowance that you used there?

A. $4900.

Q. And how did you arrive at that?

A. Well, it was Mr. Formato who set that up for us. He said, "The Midtown, that is a comparable theatre, is getting a $5000 house allowance and we would like you to go down just a little below that to be competitive."

I said, "All right; let us make it $4975."

He said, "No; that won't do; it ought to be a little lower than that."

I told him, "All right; well, then, let us make it $4900."

And he said, "That will be satisfactory."

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(4410)

Q. What was the provision in thecontract with respect to advertising?

A. The provision in the contract was that the house budget for advertising will be $700 for the first week and $350 weekly until the end of the engagement, additional advertising to be on a 50-50 basis.

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(4413)

Q. Well, I asked you how that—with respect to dealings that you have had with Mr. Formato of Loew's, how that

particular advertising clause which you have just read to us came to be formulated?

A. Well, when we talked about the 10 per cent promise that we weren't supposed to get above the house allowance and then he talked about the 50 per cent for advertising, I said, "Mr. Formato, I don't see how we could come out on anything like

(4414)

that." I said, "It is definitely impossible."

He said, "That is the way every first-run theatre in central Philadelphia is having their contracts drawn. We are treating you no different than any other exhibitor in first-run Philadelphia."

• • •

Q. Now, with respect to the opening of the motion picture—of the Viking Theatre, did it open, first of all, with this motion picture?

A. Yes, sir.

Q. And on what date did it open?

A. The theatre opened on July 1st of 1954. . . .

(4424)

Q. What did the Viking pay to the distributor for the motion picture STUDENT PRINCE?

A. $40,000.

Q. Was that its guarantee?

A. That was its guarantee.

• • •

(4427)

Q. Mr. Sley, the day the theatre opened, were the doors on the theatre?

A. Yes, sir.

Q. Was there ever any occasion when there were rugs hanging at the doors?

A. No, sir.

(4428)

Q. Was there ever a time when the doors were off the Viking Theatre?

A. Yes, sir.

Q. And when was that and for how long?

A. That was either the first Friday or the second Friday in September—I am not too sure of the date—but they were off for about four or five hours.

(4429)

Q. Is that the only time that they were off?

A. That is the only time that they were ever off.

Q. Was the theatre air-conditioned the day it opened?

A. No, sir.

Q. When was the air-conditioning actually in operation?

A. Between three and four weeks after the theatre had been opened.

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(4439)

Q. Did you personally decide, Mr. Sley, to seek to obtain, to license the picture SEVEN BRIDES FOR SEVEN BROTHERS?

A. Yes, sir.

• • •

Q. And did you personally decide to make an offer for that picture?

A. Yes, sir.

Q. And did you personally decide whether or not that offer contained a guarantee?

A. Yes, sir.

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(4441)

Q. What did you personally do, Mr. Sley?

A. I had Mr. Manning go over to see Mr. Formato.

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Q. Did you subsequently talk to Mr. Formato about this picture?

A. Yes, sir, I talked to him the following Monday.

Q. The Monday following what?

A. Following the screening of the picture, of the previous week.

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(4444)

Q. What did you say to Mr. Formato and what did Mr. Formato say to you?

A. I said to Mr. Formato: We offered you $50,000 guarantee on the picture of SEVEN BRIDES FOR SEVEN BROTHERS, and you turned us down. Why?

He said: Well, Mr. Manning came in to see me a day too late. I awarded the picture on Thursday to the Stanley Theatre, and they are going to play it for over Labor Day.

I said: We were going to play it for Labor Day.

Q. And when had the picture been screened in relation—

A. The previous week.

Q. The previous week?

A. Yes, sir.

Q. And did Mr. Formato—you went in to see him on Monday?

A. I went in to see him the following Monday.

Q. And what was the day that Mr. Formato said that Mr. Manning had been in to see him?

A. The previous Friday.

(4445)

Q. All right. Now, did the picture play at the Stanley Theatre?

A. It did.

Q. And did it play on Labor Day?

A. No, sir.

Q. When did it play?

A. It played in the latter part of October.

Q. All right. Now, Mr. Sley, what was the next motion picture that the Viking exhibited after its opening picture THE STUDENT PRINCE?

A. A picture called BETRAYED.

Q. It has been testified as to the terms under which that picture was licensed. I would like to ask you specifically with respect to the advertising on that motion picture, what was the clause, if you recall—if you do not I will show it to you—with respect to advertising?

This is this document which has been marked P-90.

A. House budget for advertising will be $700 for the first week and $350 weekly until the engagement is ended. Additional advertising to be on a 50/50 basis.

Q. Now, with whom was this contract, Mr. Sley?

A. This was with Metro-Goldwyn-Mayer, known as Loew's.

Q. And did Metro-Goldwyn-Mayer ever pay 50 per cent of all of the advertising?

(4446)

A. No, sir.

Q. What portion of the advertising expenditures actually made by the Viking have they refused to pay?

A. They refused to pay for the billboards.

Q. Anything else?

A. And the posters.

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(4448)

Q. Did you personally offer certain arrangements with respect to billboards to Metro-Goldwyn-Mayer?

A. I closed the deal on the STUDENT PRINCE and therefore I had a lot to do with the advertising as well as the guarantee and every part of that contract.

Q. All right. Now, with respect to billboards, what was the arrangement which you offered to Metro-Goldwyn-Mayer?

Mr. Ward: I renew my objection for the reasons given before, sir. The contract speaks for itself.

The Court: Overruled.

A. To begin with, Metro-Goldwyn-Mayer told us to get 50 billboards on the outside for the advertising of the STUDENT PRINCE, and we did so at their request because they had Mr. Galner, the advertising manager of Metro-Goldwyn-Mayer, bring over Mr. Lodge to my office, to my place, and he was the one who told me where he would place the various billboards.

We placed them in New Jersey and some of them in Pennsylvania and that aggregated about fourteen or $1500. And that was something that had been decided on by Mr. Formata of Metro-Goldwyn-Mayer.

By Mr. Sawyer:

Q. Now, did there come a time when you were advised that Metro-Goldwyn-Mayer would not pay for billboards?

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(4449)

Q. I am speaking, Mr. Sley, of the question of the payment for the billboards. When did that take place?

You testified, Mr. Sley, that there came a time

(4450)

when Loew said they would not pay for the billboards.

A. Oh, about the 15th of July. Say several weeks after we were playing the STUDENT PRINCE we received the bills for the various—from the various advertising agencies, and we were notified by Mr. Galner that Metro-Goldwyn-Mayer now refuses to pay for anything but the newspaper or radio advertising; that they were not going to go along with us on the billboards. So I went over to see Mr. Formata about that myself.

Q. Well, now, with respect to BETRAYED, the motion picture BETRAYED, what was the Viking offer and ar-

rangement which was made with respect to billboards? This is only with respect to your own personal arrangements, if any were made.

A. Now, the Sley System garages had a number of painted signs and billboards that they were getting about $15,000 a year for from General Outdoor Advertising Company, Stait Sign Company, and the Dave Lodge Advertising Company.

Q. Where were they located?

A. They were located throughout the central part of the city.

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(4451)

Q. What did you inform Metro-Goldwyn-Mayer if anything with respect to the rental of these boards and the use of these boards?

• • •

(4452)

The Witness: I told Mr. Formata at Metro-Goldwyn-Mayer that we will forego all the rental that we were receiving from these advertising companies and use them for the various pictures that we were going to show at the Viking Theatre and let them have the advertising space on both the painted and the poster boards for zero dollars a year.

By Mr. Sawyer:

Q. Now, was that offer for one picture alone or for more than one, and if for more than one, what pictures?

A. Well, that was for pictures that the Viking was playing and pictures that were to be shown at the Viking at a later date.

We used some of the billboards to say "Coming to the Viking Theatre" or some "Now Playing at the Viking Theatre."

Q. Now, on any instance was Metro or any distributor charged for the rental of these boards?

(4453)

A. At no time.

Q. And were there any charges in connection with billboards or painted boards?

A. There were service charges by the General Outdoor or the other sign companies to the Viking Theatre that were made by the advertising agencies for keeping the signs lighted and taking care of the signs, but no money was being paid otherwise. It was just a service charge.

Q. Now, when did the motion picture BETRAYED show at the Viking Theatre, Mr. Sley? Do you have the schedule there?

A. It was—I know it was prior to Labor Day because we played it over Labor Day.

Q. When did Mr. Manning leave the employ of the Viking?

A. In the early part of September.

Q. And thereafter, aside from yourself, who did the staff of the Viking consist of other than ushers, and other than yourself?

A. Well, Mr. Herman Comer succeeded Mr. Manning to a degree, because I actually acted as general manager of the Viking Theatre.

Q. Until when?

A. Until Mr. Wren became associated with the Viking Theatre.

Q. Now, with respect to the motion picture BARE-FOOT CONTESSA, do you recall who was the distributor of that motion picture?

A. United Artists.

(4454)

Q. And will you tell us what if anything you personally had to do with—first of all, did the Viking attempt to license that motion picture?

A. Yes, sir.

Q. And will you tell us what if anything you had to do with the negotiations or any other attempts that the Viking made to license BAREFOOT CONTESSA.

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(4470)

By Mr. Sawyer:

Q. Now, Mr. Sley, with respect to the picture BAREFOOT CONTESSA, you stated, I believe, that you personally decided

(4471)

to seek to license that picture?

A. Yes, sir.

• • •

Q. Now, I show you a document that has been marked P-71 and I ask you whether or not the terms offered therein were as a result of your personal decision.

A. Yes, sir.

Q. And does that bid offer a guarantee?

A. That offers a guarantee of $40,000.

Q. And what terms does it offer?

A. First five weeks at 50 per cent of the gross and 40 per cent thereafter; picture will be played until gross falls below $8500 per week; cancellation will become effective the following week.

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(4472)

Q. How was that bid conveyed to United Artists?

A. I personally took it over to Mr. Magill.

Q. Very well. Did you have any subsequent conversation with Mr. Magill after that time?

A. Yes, sir. Mr.—

Q. What was it?

A. —Mr. Magill called me on the phone the following day and he said, "We have given the picture to Goldman's Midtown Theatre because they gave us more playing time."

And I said, "You have ignored my $40,000 guarantee and you haven't even called me to ask me whether I would give you more playing time?"

And he said, "I am sorry—the deal is closed."

Q. Now, what respect to not playing time, but availability, what—when was the availability for the picture as according to United Artists?

A. Well, the last few days in October.

Q. And what did your bid offer as to availability?

A. Playing time, December.

Q. And how many weeks' playing time did you offer?

(4473)

A. We offered at least—well, it would have been at least six weeks of playing time, according to this, at least six weeks.

Q. And would that playing time have included any holidays?

A. That would have included the best time of the year, the Christmas and the New Year's holidays.

Q. Now, did Mr.—did the Goldman Theatres make any bid, oral or written, for this motion picture?

A. No, sir.

Mr. Rome: If you know; if you know, Mr. Sley.

Mr. Sawyer: Yes, if he knows.

By Mr. Sawyer:

Q. Did they, Mr. Sley?

A. No, sir.

Q. And did the Goldman Theatres offer any guarantee?

A. No, sir.

* * *

(4475)

Q. Now, with respect to the picture BRIGADOON, Mr. Sley—well, all right. I was going to ask you, what was the next picture that played at the Viking Theatre?

A. BRIGADOON.

Q. And we have, I believe, had in evidence the license for BRIGADOON and the terms. Let me ask you specifically what the arrangements were on BRIGADOON.

I show you the document which has been marked P-92, and is that—what is that document, Mr. Sley?

A. That is the contract of Metro-Goldwyn-Mayer for the picture called BRIGADOON which I personally had negotiated with Mr. Formato.

Q. Now, in those negotiations, did you and Mr. Formato discuss advertising?

A. Yes, sir.

Q. And what was the advertising arrangement which was arrived at between you and Mr. Formato on the picture BRIGADOON?

(4476)

A. This is the picture that Mr. Formato said, "Let us leave the advertising out," because we were having so much difficulty on THE STUDENT PRINCE and on BETRAYED that he said, "Let us leave that out until I get this matter straightened out with Mr. Reagan, the General Manager of Metro-Goldwyn-Mayer in New York.

Q. Very well; and, in fact, on the motion picture BRIGADOON—well, now, you mentioned the difficulty with STUDENT PRINCE.

Mr. Sawyer: I will refrain from having this marked because of that.

I will read the rest of it instead.

By Mr. Sawyer:

Q. Now, I show you a document, Mr. Sley, and ask you to whom that document—who is the addressee and who is the sender of that document.

A. Mr. Gallner was the sender of the document. He is the Advertising Manager of Metro-Goldwyn-Mayer here in

Philadelphia and he was sending it to the Advertising Department in New York City or the—

Q. The Advertising Department of whom?

A. Of Metro-Goldwyn-Mayer.

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(4478)

Q. Now, Mr. Sley, will you read the first paragraph of that letter only.

A. This letter was sent to—

(4479)

Q. On the understanding that the second paragraph refers to matters having totally—

Mr. Nizer: Well, then, don't disclose it.

Mr. Sawyer: Well, I want it understood why, not because we are not disclosing it, but it refers to matters involving other places, other times, and other people.

The Witness: This letter was sent to Mr. Sidney Goldstein of the home office in New York on September 13, 1954.

"Dear Sidney:

"My first request for payment on THE STUDENT PRINCE at the Viking Theatre went in to you on July 28. Since that time, there have been other requests up to and including September the 7th. I have been informed that the Viking Theatre has not as yet received a single payment. For your information, the Viking has already paid us $40,000 for the picture.

"Cordially yours,

"Ed Gallner."

Mr. Sawyer: Very well.

By Mr. Sawyer:

Q. Now, you testified that there was a disagreement about the advertising with Loew's and with respect to the picture

(4480)

BRIGADOON that clause respecting advertising left out of the contract.

A. Yes, sir.

Q. Now, in fact, did— What amounts were expended, not in dollars, but what amounts were expended—

Mr. Sawyer: Well, strike that.

By Mr. Sawyer:

Q. Were there any amounts expended by the Viking Theatre for advertising the picture BRIGADOON?

A. Yes, sir.

Q. And did the Viking in the course of business receive bills for that advertising?

A. Yes, sir.

Q. And were those bills sent to Loew's?

A. Yes, sir.

Q. And did you receive reimbursement for a share of the advertising from Loew's on that picture and, if so, how much? Do you want the record for that, Mr. Sley?

A. I think I would need a record for that, but I know we didn't receive all the money.

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(4482)

TWENTY-SEVENTH DAY

• • •

(4484)

HARRY SLEY, recalled.

DIRECT EXAMINATION (Continued)

By Mr. Sawyer:

Q. Now, Mr. Sley, with respect to the motion picture ATHENA, did that play at the Viking Theatre?

A. Yes, sir.

Q. What was the playing time of ATHENA, the playing time commitment for the Viking?

(4485)

A. Four weeks.

Q. How was that four weeks arrived at, Mr. Sley?

A. Well, Mr. Formato is the person who told me that we would have to play ATHENA four weeks if we wanted to get the picture THE LAST TIME I SAW PARIS, which had been pushed back from Thanksgiving to Christmas.

Q. And did you get the picture THE LAST TIME I SAW PARIS?

A. Yes, sir.

Q. And do you recall, Mr. Sley—

Mr. Sawyer: I believe, again, Your Honor, the grosses, the rentals and the guarantees are in on that, so I will skip over it.

By Mr. Sawyer:

Q. Do you recall when Mr. Wren was on the witness stand that Mr. Nizer—strike that.

I believe Mr. Goffman, one of the defense attorneys, was cross-examining as to whether or not the payment for

the film rental on THE LAST TIME I SAW PARIS had not been held up by the Viking Theatre, the payment to Loew's; do you recall that?

A. Yes, sir.

Q. When did THE LAST TIME I SAW PARIS open? Do you have your schedule in front of you, Mr. Sley?

(4486)

A. No, I have no papers here. I think it was around the middle of December.

Q. This is P-171 I believe.

Mr. Young: 176.

Mr. Sawyer: Yes, 176, that is right.

By Mr. Sawyer:

Q. Those dates are on that exhibit. Just give us the date when it opened.

A. The 12th, the 14th, 1954.

Q. December?

A. December 14th of 1954 is when THE LAST TIME I SAW PARIS opened.

Q. And when did it close its run?

A. It closed on February 15th of 1955.

Q. Now, Mr. Sley, I show you five checks and I will ask you on what corporation are the checks drawn.

A. On the Viking Theatre Corporation.

Q. To whom are they payable?

A. Metro-Goldwyn Mayer.

Q. Were those checks payments for film rental on THE LAST TIME I SAW PARIS?

A. Yes, sir.

Q. Will you read the dates of the checks and the amounts, please?

(4487)

A. December 24, 1954, Metro-Goldwyn Mayer, $10,000. I am sorry, I got them out of context. Oh, no, I haven't.

December 29th, 1954, $10,000.

January 11th, 1954, $10,000.

February 28th, 1955, $12,898.23.

And another check made out to Metro-Goldwyn Mayer February 28, 1955, for $973.52, all for THE LAST TIME I SAW PARIS, indicated on the part of the check stub.

Q. Do those amounts total the film rental that was due from the Viking on THE LAST TIME I SAW PARIS?

A. Yes, sir.

• • •

Q. Were there advertising expenses expended in accordance with the contract on THE LAST TIME I SAW PARIS?

A. Yes, sir.

Q. And under that contract was Metro-Goldwyn Mayer to share a portion of this advertising expense?

A. Yes, sir.

Q. At the time that the film rental was paid as disclosed by those checks had they paid that amount in full?

(4488)

A. No, sir.

• • •

(4491)

Q. Well, I will ask you this, Mr. Sley: With respect to an amount for advertising on THE LAST TIME I SAW PARIS did Metro contend that they didn't owe it to you at this time?

A. No, sir.

Mr. Sawyer: All right. Now, with respect to the BRIDGES OF TOKO-RI, Mr. Sley. It is P-11, the bid is, which has been introduced and marked for identification.

I would like to read in connection with THE BRIDGES OF TOKO-RI Paramount's answers to requests for ad-

(4492)

missions, No. 2.

Mr. Ward: Now, will you wait until I find that, please?

Mr. Sawyer: Yes.

Mr. Ward: Requests for admissions No. 2 of Paramount.

I have them now, Mr. Sawyer.

Mr. Sawyer: 2(c):

"On December 2, 1954, Mr. Comer submitted an offer for the Viking Theatre of a cash guarantee of $22,500, against a film rental of 50 per cent of the gross receipts for the first three weeks and 40 per cent thereafter, a minimum playing time of five weeks, the picture to be held over for a sixth week should it gross $7,500 or more in the fourth week, and so on in successive weeks. Advertising was to be discussed."

Answer: "Admitted."

2(d): "On December 3, 1954, Mr. Comer advised Mr. Smith that the picture would follow a picture scheduled to open at the Viking on January 26, which was to play four weeks and also advised Mr. Smith that there was a possibility that the Viking might be able to open the BRIDGES OF TOKO-RI on January 26. He also stated that the advertising expenditures would be equally divided between you and the Viking

(4493)

after a house budget of $700 for the first week and $350 weekly thereafter."

Answer: "Admitted."

2(e):

"The Viking offer was rejected because the guarantee of $22,500 was deemed to be of 'of too little value.'"

Answer: "It is admitted that the offer of the Viking Theatre for the motion picture 'THE BRIDGES OF TOKO-RI' was rejected and that one of the reasons for said rejection was that the guarantee of $22,500 was of too little value. It is denied that this was the sole reason for said rejection."

2(f):

"On December 9, 1954, you advised Mr. Comer of this rejection. Thereafter you did not offer to negotiate with the Viking Theatre for the picture."

Answer: "It is admitted that this defendant advised Mr. Comer of the rejection of Plaintiff's offer on December 9, 1954. The balance of said request for admissions is denied and this defendant states that at all times it was ready and willing to negotiate with plaintiff for the licensing of the motion picture 'The Bridges of Toko-Ri.'"

(4494)

2(g):

"On January 10, 1955, the picture was awarded to William Goldman Theatres, Inc., pursuant to a license agreement executed on that date for exhibition at the Randolph Theatre on an indefinite run, for a film rental of 50 per cent of the gross receipts weekly."

Answer: "Admitted, except that the contract provided that for the second and subsequent weeks film rental was subject to a sliding scale as set forth in the contract."

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(4496)

Mr. Sawyer: This is still BRIDGES. (h):

"At no time had William Goldman Theatres, Inc., submitted any written bid or offer for this picture."
Answer: "It is admitted that William Goldman Theatres, Inc., did not submit a written bid."

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(4508)

Mr. Sawyer:

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I will read from the answers of Warner Brothers, Mr. Goffman, No. 1:

With respect to the picture BATTLE CRY—

Mr. Goffman: Wait until I find it, please.

Mr. Sawyer: With respect to the picture BATTLE CRY: (a) On November 22, 1954, Mr. William Mansell, your Philadelphia District Manager—"your" meaning Warner Brothers—called Herman Comer of the Viking Theatre and advised him that BATTLE CRY was being released in March, 1955 instead of EAST OF EDEN, and it would be screened in the middle of December, 1954.

Answer: Admitted.

On December 7, 1954 Mansell called Comer and advised him that the screening would be held on December 13 at 2:00 P.M. in the Universal screening room.

Admitted.

By Mr. Sawyer:

Q. Now, Mr. Sley, at the time, i.e., November 22, 1954, that the Viking Theatre Corporation was advised that BATTLE CRY would be released in March, 1955, was the Viking then available for showing that motion picture?

(4509)

A. Yes, sir.

Q. Now, thereafter, on the basis of that—strike "on the basis of that"—thereafter did the Viking obtain another motion picture for the month of February?

A. Yes, sir. We obtained a picture called TONIGHT'S THE NIGHT to play in February.

Q. And just so there will be no confusion, was TONIGHT'S THE NIGHT produced or distributed by a defendant distributor?

A. No.

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(4510)

Q. Is this a record of the Viking Theatre Corporation, P-32?

A. Yes, sir.

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(4511)

Q. Now, will you read that letter, please.

A. December 13, 1954.

Mr. Herman Comer
Viking Theatre
19th and Chestnut Streets
Philadelphia, Pa.

Dear Mr. Comer:

Attached please find competitive bidding application for the first-run showing of BATTLE CRY in the City of Philadelphia.

When submitting your offer we request that you include as part of your bid the starting date of February 9 or 10 or 11 or 12.

(4512)

Cordially yours,

Beilan, Branch Manager.

Q. Branch Manager of what, Mr. Sley?

A. Of Warner Brothers Distributing Company.

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(4513)

Mr. Sawyer: No. this is (f). I am sorry.

No bid for BATTLE CRY was received first-run Philadelphia from William Goldman Theatres, Incorporated.

Answer: It is admitted that no written bid or offer was received from said corporation.

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(4514)

Q. What are the dates given there on which you are to give availability in your bid?

A. The 9th, 10th, 11th or 12th of February.

Q. When did it play the Randolph Theatre?

A. A week later.

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(4548)

Q. Did the Viking ever seek to obtain product of Universal?

A. Yes, sir.

Q. And did Universal receive a letter that you testified to yesterday with respect to the Viking wishing to license their motion pictures?

A. Yes, sir.

Q. Was any reply had from that letter?

A. Yes, sir, they replied.

Q. When was the letter that you are referring to, Mr. Sley?

A. Early October of 1954.

Q. Was there any letter sent to Universal previous to

(4549)

that time?

A. There was a letter sent to Universal in the early part of April of 1954.

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(4553)

Mr. Sawyer:

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I will read from the requests for admissions, the Universal admission. This is the second letter. Request 36.

Mr. Ward: Request No. 36?

Mr. Sawyer: Yes.

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(4554)

Mr. Sawyer: It is the second letter:

"On October 25, 1954, Herman Comer wrote to your Philadelphia Branch Manager, Edward Heiber, on behalf of the Viking Theatre Corporation, as follows:

"'We are interested in making offers for your product for first-run exhibition in Philadelphia, at the Viking Theatre.

"'Will you kindly inform me as to your coming product, availability and the screenings.'

"This letter was received by Mr. Heiber at your Philadelphia branch office on October 26, 1954."

A. Answer: "Admitted."

37:

"On October 26, 1954, the morning Mr. Heiber received that letter, Mr. Comer came into his office and Mr. Heiber told him that he had no pictures avail-

(4555)

able at the time for the Viking Theatre but that he would contact Mr. Comer when he did have pictures available for the Viking Theatre and try to negotiate with him."

A. Answer: "Admitted."

Q. Now I have the following documents:

Mr. Young: Are these documents that are already numbered, Mr. Sawyer?

Mr. Sawyer: They have deposition numbers.

Mr. Young: That doesn't help me unless you tell me what they are.

(Counsel confer.)

Mr. Nizer: No objection.

Mr. Sawyer: I would like to have these marked as Plaintiff's Exhibits 183, 184, 185 and 186.

(Universal feature license agreement with Goldman for MAN WITHOUT A STAR was marked Plaintiff's Exhibit 183 for identification.)

(Universal film feature license agreement with Goldman for CAPTAIN LIGHTFOOT was marked Plaintiff's Exhibit 184 for identification.)

(Universal feature license agreement with Goldman for SMOKE SIGNAL and ABBOTT & COSTELLO MEET THE KEYSTONE COPS was marked Plaintiff's Exhibit 185 for identification.)

(4556)

(Universal feature license agreement with Goldman for SIGN OF THE PAGAN was marked Plaintiff's Exhibit 186 for identification.)

Mr. Sawyer: Your Honor, these documents having been agreed to as authentic, I would like to read portions thereof to the jury.

The first document has been marked P-183. It states at the top "Universal Film Exchanges, Inc. Feature license agreement." "Title or description of picture: MAN WITHOUT A STAR." The agreement is signed William Goldman Theatres, George Beattie, exhibitor. The date of the application is November 8, 1954, the contract having been approved by Universal on November 19, 1954.

Document 184, "Universal Film Exchanges, Inc., feature license agreement," "Title or description of picture: CAPTAIN LIGHTFOOT." The contract is signed by William Goldman Theatres, Incorporated, by George Beattie. The date of the application is November 8, 1954, the contract approved by Universal November 19, 1954.

P-185, a contract for Universal Film Exchanges, Incorporated. "Title or description of picture:"—two pictures: "SMOKE SIGNAL, ABBOTT & COSTELLO MEET THE KEYSTONE COPS." It is signed William Goldman Theatres,

(4557)

Incorporated, by George Beattie. The date of the application, November 8, 1954, approved November 19, 1954.

P-186, contract from Universal Film Exchanges, Incorporated, for the motion picture SIGN OF THE PAGAN. William Goldman Theatres, Incorporated, signed by George Beattie. The date of the application is November 8, 1954, the contract approved by Universal November 19, 1954.

By Mr. Sawyer:

Q. Now, Mr. Sley, what was the next action that you took, if any, with respect to obtaining Universal films, you yourself?

A. I went to New York with Mr. Wren in September of 1955.

Q. Whom did you see in New York?

A. We saw Mr. Dana.

Q. Is this the meeting as to which Mr. Wren has previously testified?

A. Yes, sir.

Q. Now, without, Mr. Sley, in order to save time, going into all the detail, but this was the meeting which involved the typewritten sheet of paper?

A. Yes, sir.

Q. Without all of the details of that negotiation would you simply tell us after your arrival at Mr. Dana's office what you stated your purpose was in coming to see him, and

(4558)

what he stated. Of course, we won't go into all of the figures and how they were arrived at.

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(4558a)

The Court: All right, you tell us the conversation. What was said by you and what was said by Mr. Dana.

(4559)

A. We told—I told Mr. Dana that I wanted the picture called ALL THAT HEAVEN ALLOWS. Mr. Dana told me that we would have to take a package deal of four pictures and he would not deal with us individually for ALL THAT HEAVEN ALLOWS.

By Mr. Sawyer:

Q. Very well, Mr. Sley. Now, just to make it clear, you don't purport by this statement to relate the entire conver-

sation had between you and Mr. Dana during this entire meeting?

A. No, sir. They lasted over five hours.

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(4560)

Q. Now, you have testified I believe that you played LAST TIME I SAW PARIS, and then you played—the next defendant distributor picture you played was what after that?

A. HIT THE DECK.

Q. And the one after that?

A. GLASS SLIPPER.

Q. Very well. Now let's take all the motion pictures that you played on which there were guarantees given by the Viking up until this time that THE PRODIGAL commenced.

Did you offer a guarantee on THE STUDENT PRINCE?

A. $40,000.

Q. What was the actual earned film rental on that motion picture?

A. $36,935.

Q. What was the next picture you played?

A. BETRAYED.

Q. Was there a guarantee on that?

A. $30,000.

Mr. Ward: If Your Honor please, I don't know in what direction this is going but I detect that it is an area that would be improper in an evidential sense. May we ask for an offer of proof by this demonstration at side.

(4561)

bar?

The Court: Very well.

(At side bar:)

Mr. Sawyer: I offer to prove, Your Honor, by taking all of the motion pictures that were exhibited at the Viking during the time that Mr. Sley had personal charge of the matter, and before Mr. Wren's coming in to formulate the bids, that the guarantees offered by Mr. Sley most closely approximated the earned film rental to indicate Mr. Sley's ability and knowledgability, his ability to estimate well what the performance of a picture would be; to show, in other words, his ability as a motion picture operator.

Now, this covers the period up until the time that Mr. Wren gets here. There are five pictures involved.

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(4569)

By Mr. Sawyer:

Q. Now, this is your guarantee. This is the (indicating).

Now, when you make a guarantee, Mr. Sley, on a motion picture, as Mr. Nizer pointed out, does the guarantee come into play on the basis of how high this goes (indicating)?

A. Yes, sir, you have to lay out the difference.

Q. Or if this exceeds it, then your guarantee doesn't come into play, is that correct?

A. Well, then you have to give the additional amount of money in addition to your guarantee.

Q. Yes, but the guarantee then isn't an element?

A. No, that's right.

Q. Now, this is what your guarantee was on STUDENT PRINCE?

A. $40,000.

Q. And this is what it actually earned (indicating).

Now, on BETRAYED you stated you had a guarantee of $30,000. What was the actual earned film rental on that one?

A. $30,598.

Q. What was the next picture on which you offered a guarantee?

A. BRIGADOON.

Q. What was the guarantee?

(4570)

A. $25,000.

Q. What was the earned film rental on BRIGADOON?

A. $28,438.

Q. By the way, did you personally decide on each one of these guarantees, on the amount they would be, or did someone else?

A. Yes, sir.

Q. Now, what was the next picture on which you offered a guarantee?

A. LAST TIME I SAW PARIS.

Q. What was the guarantee offered?

A. $40,000.

Q. What was the earned film rental?

A. $43,896.

Q. The next picture?

A. GLASS SLIPPER.

Q. What was the guarantee?

A. $17,500.

Q. What was the earned film rental?

A. $17,646.

Q. Very well, that is all.

Now, Mr. Sley, what is the biggest single expense of doing business as a motion picture exhibitor?

A. The paying of film rental.

(4571)

Q. What percentage of your gross at the Viking Theatre did you pay in film rental?

Mr. Ward: Objected to, sir.

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Mr. Wolf: Objected to on the ground that the amount of film rental that Mr. Sley voluntarily agreed to pay is no evidence of anything except perhaps that it was too much, that he wasn't a very skillful negotiator, and if it was too little that he was a very clever man. But it proves

(4572)

nothing with respect to anything else as far as I can see.

Mr. Rome: You will recall, sir, that Mr. Sley has just a moment ago testified that with regard to every one of these guarantees that he voluntarily on his own initiative fixed the amount of those guarantees, so that this has to do with the ultimate percentage of film rental that he has paid, and this has no bearing on the issues in this case.

Mr. Young: And furthermore, Mr. Sawyer when I was examining Mr. Wren said, "I concede that we weren't forced to make any of these offers."

The Court: How do you answer that, Mr. Sawyer?

Mr. Sawyer: Well, Your Honor, it all depends on what "forced" means. Of course you are not forced to make them in the sense that anybody put a gun at your head and told you you had to make them or passed a law that you had to make them. You made certain offers because you had to stay in business, and in that sense you are forced to make them.

Now, the foundation for this, Your Honor, is to begin a foundation for the evidence which will come in at the end of the case, in my case, as to our damages. Schedule A is based on exactly this principle. You have to

(4573)

have in the record what in fact he paid. That is an evidentiary matter.

The Court: Well, no, these figures are agreed to, as I understand it.

Mr. Rome: They are in the record, sir.

The Court: Schedule A is agreed to, isn't it?

Mr. Rome: Oh, no. Not Schedule A, sir. But there has been testimony—

The Court: But the figures.

Mr. Nizer: The figures.

The Court: The computations.

Mr. Nizer: Your Honor is right.

Mr. Goffman: P-176 has all the evidence in it, Your Honor.

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(4574)

The Court:

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I will sustain the objection.

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(4579)

Q. Mr. Sley, what are the two most important factors in the success or failure of a motion picture exhibitor?

A. Well, buying quality films at reasonable rentals.

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(4620)

TWENTY-EIGHTH DAY

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(4709)

Mr. Sawyer:

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(4712)

Now, as to some more general observations about the way these comparisons were done, I don't know if I am

being reproached for having done them in a different way than I undertook to—I thought that I caught that current in Mr. Nizer's statement—but I also think, if Your Honor will see, will consult my brief and the notes of testimony, you will see that I stated any number of times that we propose to do exactly what we did do, that we would not have Mr. Wren sit on the stand and give his judgment as to whether or not this bid was better than that bid, but would, rather, simply take the final result as it occurred and as it actually happened and see what would have happened if that film had been awarded to the Viking on its terms.

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(4717)

The picture SOLID GOLD CADILLAC, we have a somewhat of a special situation. They say that I have conceded that this picture is no longer to be counted—and, of course, it is in my brief and read. I don't know why. Your Honor has it. I don't make any such concession. I do make a concession on SOLID GOLD CADILLAC that I make on no other picture, except THE MOUNTAIN which I agreed to completely take out, and that concession is that I would say that it is fair to say that Mr. Wren's admission on SOLID GOLD CADILLAC is one which would tend to minimize the contrast which we originally showed. What I said is—and I might as well read what I said after what Mr. Nizer had read—I say that:

> "It is conceded that in the instance of SOLID GOLD CADILLAC the defendants distinctly mitigated the

(4718)

> effect of the original comparison. It is even conceded that Wren's admission would tend, with respect to this particular picture, to lessen the conclusion"—to lessen the conclusion—"that Columbia acted consciously

against their best economic interests. But suppose all of this is conceded, the fact remains that had the film been awarded to the Viking under the terms of its bid, it would have returned to Columbia $5400 and some odd more in film rental."

Now, what was this based on, Your Honor? There was no attack, Your Honor understands, in the case of SOLID GOLD CADILLAC whatsoever on that fact. That fact stood unimpaired throughout the cross-examination and no cross-examination was directed to that fact.

What is the fact? That if the Viking bid had been accepted, that the terms offered by the Viking were such as to have returned to the distributor $5400 more.

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(4728)

Mr. Sawyer: Your Honor, then Mr. Phillips said, "If you wish to do so you may do so unconditionally." So then we bid.

Then we were told it was late. Now, that is the argument. Whether the bid was late or not is an argument,

(4729)

and if the jury believes that the bid was late, then they will say, "Well, the fact that it would have earned more film rental at the Viking goes out because the bid was late," if the defendants have succeeded in convincing them that the bid was late. We don't say that it was late. We agree that it was made after the date on which they told us the bids were due, but we claim that Mr. Phillips' letter was a statement to us to go ahead and bid conditionally. We had this problem about the screening and they said, "All right, you bid unconditionally. If you wish to, you may submit a bid unconditionally."

Now, whether it is late or not has nothing to do with the fact that we demonstrated that if Paramount had awarded that picture to the Viking that the terms offered by the Viking Theatre would have earned it $19,600 more. That was never impaired or impeached in any way. There is no question of longer playing time because WAR AND PEACE never earned that much in any given week, and that, therefore, stands unimpaired as to the purpose of the demonstration. Whether the bid was late or not, nothing has been withdrawn. And let's assume that it was late. That still doesn't impair it because there you would still have the right on the part of the distributor to consider a markedly superior bid which arrived late, particularly after a controversy about it and

(4730)

a reason for its being late, and when the availability is way ahead, we still think that if the bid is markedly superior that lateness then becomes only a factor.

This isn't the Government, this isn't bidding for Government procurement where there is a statute which says that a bid on a certain time must be received. And I am mindful of Your Honor's ruling of yesterday that when they say they have to make a bid at 5:00 o'clock on a given day that you shouldn't wait until the afternoon, even though they say 5:00 o'clock on a given day. So I take it that lateness isn't that critical. It is not as if it were governed by some statute which prevented them from doing it.

But in any event, that is no grounds for striking the demonstration whatsoever. The lateness of the bid is in another part of the case and it will be either believer or it won't be believed. But there is no grounds, no argument made that under the rules of evidence because we have an excuse for this, because we have a defense to it, you have to strike the evidence.

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(4736)

THE MOUNTAIN remains withdrawn.

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(4764)

TWENTY-NINTH DAY

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(4771)

Mr. Sawyer: Your Honor, may I suggest, with Mr. Nizer's indulgence, that I say a preliminary word about a revision of Schedule A that we understand be now included, since that change was due to defendants on Friday. I think that might be well, if there is no objection, with Your Honor's permission.

The Court: What might be well?

Mr. Sawyer: If I just said a word preliminarily about the reasons for the revision.

The Court: Suppose you go ahead, because that has to do with the preparation of the schedule.

(4772)

Mr. Sawyer: The change.

The Court: And I have the other copy.

Mr. Sawyer: The revised Schedule A, as is noted, includes a theatre, the defendant's theatre, which was not included in the original Schedule A as was presented.

This is a change which affects total, and I would just like to say a word about it.

I hadn't noticed it actually originally, that the Stanton was not included, and when I noticed it, and Mr. Steinberg pointed out to me some time ago that it was not, we considered the theory on which it was not included.

The theory on which it was not included, as I have seen from the various pretrial memoranda and whatnot, was that during I guess the major portion of the suit period the Stanton as was testified to by Mr. Fabian was a house in somewhat run-down condition and which played slough product, and the idea was that it was not really in the primary, first-run, market.

It was remodeled extensively during the period of the suit and quite completely, and you remember Mr. Fabian said they put in an escalator and air-conditioning and so on, and then it began to play and sought on the same basis as other theatres first-run product.

Now the theory undoubtedly was that since it (4773)

was just at most on the periphery of real first-run, that it would not be necessary or really fair to the Viking to include it in this calculation. It seemed to me, however, that after it became first-run, although, as I say, more than half way through, but that period was a substantial one—that after it became a first-run theatre I could not sustain the position that its grosses and its differential between gross and film rental should not be included. And I think to make it precisely correct one would have taken the Stanton and weighted it downward in its balance in the average for just that time that it was a first-run, straight out first-run theatre.

This, of course, is cumbersome, and there is another argument which the defendants can make, which I think would have some merit, and that is, if you have a chain, if you have three theatres in your corporation and three mouths to feed, so to speak, if you choose to play the poorest product in one of those theatres, that would not justify the theatre with which it is to be compared to your situation in excluding that one and taking the two theatres in which you desire to play better product. You could say the same thing about one of the theatres in the Goldman chain.

Therefore, it seemed to me unbalanced that, although it is not implausible to exclude the Stanton, and

(4774)

although I think putting in for its full weight during the whole period is to give the defendants some nod in terms of differential that they perhaps would not be strictly entitled to, it is a closer approximation to fairness to put the Stanton in totally than to leave it out totally. Although the most fair thing might be to balance in between.

For that reason a week or two ago I had prepared this revision, and we then made up the chart which we have here, an enlargement of that, on the basis of including the Stanton Theatre. So it is now in there.

It does diminish the damages sought by the plaintiff from four hundred and thirty-nine I guess to three hundred ninety-one, but it seemed to me on balance it probably was the fair thing to do.

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(4811)

The Court: Well, what I wanted to ask you, Mr. Young, is this: You devoted a large part of your brief to the law which requires the plaintiff to prove what is

(4812)

called the fact of damages—that is—

Mr. Young: The fact of damages.

The Court: —before evidence as to the amount of damages can be introduced and, of course, Schedule A is for the latter reason.

Now, I agree with that law, but how can I say now, even if I would believe that no fact of damage has been shown—what you are saying is there should be a directed verdict or a non-suit at this point because he hasn't proved any fact of damage—but I will repeat,

even if I believe that, shouldn't the plaintiff have an opportunity to prove the fact of damage or the conspiracy by other evidence which he contends he will be able to establish a conspiracy by all of the evidence?

Mr. Young: I understand the pretrial orders that were entered in here and the witnesses that were listed by the plaintiff, Wren and Sley were to testify as to the dealings of the plaintiff with the various distributors. Of course, they had no dealings with any of the exhibitors. That has been thoroughly established.

No. He is not entitled. He has had his opportunity. He had Wren on the stand for five weeks, and if he had any evidence as to damage, as to the fact of damage, it should have been brought out. It should have been brought

(4813)

out then.

Normally, as you know, these damage schedules come in at the end, and that is it.

No, I don't think he could come back now and say, "Well, good Lord, Wren didn't testify to this." But he had every opportunity. He had him on direct, on redirect and on direct again.

Now, the law, as you say, you accept it, because we know there can be no dispute about it, but there has to be some casual connection between the damage that was sustained, not losses, not necessarily. I don't know whether this man lost money or not. He said on a few pictures that he did.

The Court: Well, Mr. Young, I know that evidence is not made competent, incompetent evidence is not made competent because there is no other evidence available, but assuming that, how can the plaintiff prove damages, how could he prove damages in your judgment, assuming he had them?

Mr. Young: Well, Judge, I am not trying this case for Mr. Sawyer. I think that is up to him to figure out how he can prove damages.

The Court: All right. I am asking you.

Mr. Young: Don't you agree with me?

(4814)

I mean, if you want to, I will be glad to write a law review article or something like that on that matter; and you see what I mean, don't you?

The Court: You let me have the answer to that question, then, Mr. Sawyer.

Mr. Young: Yes. I think that is up to Mr. Sawyer to answer that; yes.

The Court: All right.

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(4822)

Mr. Sawyer:

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(4827)

Now, here again, Your Honor, we are not involved in an argument about grossing potential. The gist of Schedule A is not grossing potential, nor does grossing potential enter into Schedule A. The essence of Schedule A is a difference between film rental as compared to gross. We have constantly this argument about whether or not the Viking can gross what other theatres can gross. This is inherent whenever this system is used, and theatres are naturally of different sizes. It was confronted in these other cases. And at most it was argued that it was an argument which could be made to the jury. It has never been held to have invalidated the system. This as we know was done in Bigelow. The defendants in the Sablosky case, these same defendants here, took precisely

(4828)

the opposite position, Your Honor.

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(4854)

Now, one further—and this is the last word, Your Honor—it has been stated here that what is lacking is

(4855)

the proof of the fact—the fact of damage. Well, the fact of damage, Your Honor, in an antitrust suit is exactly what this schedule establishes. The fact of damage in an antitrust suit is, assuming that you find that there is a conspiracy, did the plaintiff because of difference in treatment, because of not being in the favored position that the conspirators were in, was he damaged and, if so, how was he damaged?

• • •

There is no more critical item in the conducting of a first-run theatre than what you pay for film rental.

I might say that as far as foundation goes, whenever the testimony veered at all towards this fact, there was objection from the defendants.

I asked Mr. Sley whether or not—what was the most single significant cost of doing business as a first-run operator, and that was objected to. Now, it is obvious that what it is—the cost, of course, is that of film rental. The single significant factor involved is getting quality pictures at a film rental which is reasonable.

Now, how we were damaged is shown by Schedule A. That is how we were damaged, but the record doesn't stop there.

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(4880)

Mr. Rome: I have just this thought, sir. Of the various and startling statements made by Mr. Sawyer, the one that I would most particularly bring to Your

Honor's attention is his comment in response to Your Honor's remarks that the fact of damage is shown by his Schedule A. If anything flies in the face—

The Court: No, I don't agree with that at all. In other words, you prove loss and you say there was conspiracy. I don't think that follows at all any more than if I was hit by an automobile and damaged so, therefore, it was the fault of the driver. You will have to convince me as to that because I don't think—in other words, I think the law is clear that you have to prove the fact of damage before you can show damages, monetary damages. That is the general principle of law. In this court lots of times we separate liability from damages if there is any question as to whether there is any liability. But merely by showing this statement of $390,000 loss under your computation, I don't think it means anything with respect to establishing the fact of damage or the conspiracy.

So I agree with you, Mr. Rome, as to that.

And, Mr. Sawyer, if you feel otherwise I would like to have a brief on that point.

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(4889)

The Court: Well, why do the cases then say that before you can prove damages, that is monetary damages, the amount of actual damage in dollars, you have to prove the fact of damage.

(4890)

To me that is clear, that you can't prove the fact of damage by the dollars in damages. However, we don't have to decide that at the moment. But it is important, so, therefore, I would like to have a brief on that point.

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(4892)

The Court: Very well, gentlemen. I will reserve decision on that ruling.

At this time I desire to rule on the defendants' motion to strike plaintiff's illustrations or comparisons relating to the rejection of superior bids and the acceptance of inferior bids.

This matter, which was the subject of arguments of counsel on June 23, last Friday, appearing at pages 4620 to 4763 of the notes of testimony, has also been briefed and argued heretofore. Initially the question arose on defendants' objections to the proposed manner of proof, which objections they supported by their brief filed one month ago today.

Those objections to the proposed illustrations were overruled and the illustrations were presented by plaintiff witness, Mr. Jay Wren. On June 12, notes of testimony pages 3177 to 3190, I gave the jury a cautionary instruction as to the weight or lack of weight to that particular kind of comparison.

On June 14 I prepared an additional instruction on the same subject which I have added to the draft of my proposed charge to the jury which for identification I am calling the "Charge concerning the Toko-Ri illustration."

I will not read that now since it is along the lines of what I previously told the jury.

(4893)

To say the least, it is somewhat unusual for this Court to give such instruction during the trial but I thought it should be brought to the attention of the jury while such evidence was being presented and because of the fact that I thought, as I indicated, that it was very weak. But to go to the extreme asked by defendants, and order all the testimony of Mr. Wren relating to the inferior-superior computation as stricken would in my judgment be most extraordinary.

I shall not prolong this record by restating the respective arguments of counsel. Both sides it seems agree that to strike this testimony would require, and I quote, "A clear showing that it lacked relevance or that it was misleading and prejudicial."

I get this statement from plaintiff's brief filed June 23, and from Mr. Nizer's statement in the argument on Friday at page 4673.

The three points will be taken up in order, that is, lack of relevance; misleading; prejudicial.

I have heretofore ruled that figures and computations purporting to show acceptance of inferior bids were not without relevance in my judgment. What quantum of showing it would take to support an inference of conspiracy is quite another matter and beyond the immediate problem.

(4894)

The next objection is that the testimony was misleading. These figures, projections and extensions were scarcely presented in a vacuum. Not only was there exhaustive cross-examination as to the manner in which computation was made, but also there was the cautionary instruction of this Court. In that instruction I tried, within the limits of the judicial function, to make sure that the jury did not, for instance, mistake the speculative parts of the projection with the factual or historical elements. Furthermore, as I have shown, I intend to recapitulate that caution in the final instructions to the jury.

I therefore find that the testimony was not clearly misleading and, certainly, as I said before, not clearly irrelevant.

To evaluate its possible prejudice, it is necessary to consider its character and form. That form was about as bare of emotional aspects as imaginable—tabulations of figures. In a sense, it was demonstrative

evidence in that it was designed to demonstrate matters as to which direct, eye witness testimony was impossible.

To eliminate further possible prejudice these figures were placed on the blackboard, and, of course, will not go out with the jury.

The general rule as to demonstrative evidence

(4895)

is, and I think the authorities agree, or at least my research over the weekend seems to make it so, that close questions should be decided in favor of admissibility so long as the dangers of appeal to passion and prejudice are not disproportionate. The cases, of course, usually arise in the context of colored photographs, models to demonstrate human anatomical details, demonstrations of that nature.

The trial judge's unique opportunity to observe the demeanor of witness and jury has always been recognized. Having been in that position here, and on the basis of my observation, I shall rule without more that the illustrations or demonstrations of projected comparisons did not, in my judgment, amount, as they were presented, to a prejudicial demonstration and definitely did not inflame the jury.

I state as a simple fact that in the opinion of this Court that any possible unfairness in the figures presented by plaintiff's witness Wren was subjected to cross-examination which in all necessity must have corrected any misunderstanding.

Counsel have rung all the changes on both sides on the alleged contradictions in the testimony of the witness and in his computation. I shall say no more than I know of many instances where trial courts have committed error by deciding that a great deal of contradiction added

(4896)

up to disqualification or impeachment of a witness or his testimony. I am frank to say that I know of no case where a Court has committed error by refusing to strike the testimony of a witness by virtue of contradictions brought out in cross-examination. As you so well know, gentlemen, the resolution of controverted questions of fact is the function of the jury.

Defendants have asked for separate rulings as to the testimony in question as it relates to separate defendants or groups of defendants. I prefer to make the ruling as to all. The danger of creating the inference that some defendants were guilty and some innocent by attempting an instruction now, which would free some one or more defendants from the asserted burden of the Toko-Ri illustrations seems to this Court to outweigh any possible value or virtue of whatever ruling might be made. That is to say: Were it possible to determine that the Toko-Ri line of illustrations, as the result of some concession made on cross-examination or the like, was left without any applicability as to the defendant X or defendant Y, I still deny the separate motion of X or Y. Were I to grant it, stating the reasons, it would be indeed difficult to do so, in my judgment, without confusing the jury and leaving it with a lurking doubt that I did not mean my cautionary instruction to the effect that

(4897)

the illustrations were merely illustrations and, so far as their purported result went, not history.

The matter of separate rulings is further complicated by the question of withdrawn pictures. I find reference to withdrawn or not withdrawn pictures at 12 pages in the notes of testimony for June 23. Those references are pages 4655, 4660, 4663, 4665, 4666, 4667,

4668, 4696, 4713, 4737, 4752 and possibly at 4688. No guarantee of accuracy attaches to those references; they are merely, if I may be pardoned the use of the expresion, an illustration.

It is therefore suggested that counsel may be able to stipulate orally, in due course, as to just which pictures in question, or formerly it questioned, are withdrawn. Both agree if that can be done. You therefore have my ruling, gentlemen, which is, I repeat, that all motions of the defendants to strike the testimony presented by witness Jay Wren as to the comparisons of superior and inferior bids are denied.

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(4899)

TED MINSKY, having been duly sworn, was examined and testified as follows:

Mr. Sawyer: Your Honor, I call this witness as of cross-examination under Rule 43(b).

The Court: Very well.

Mr. Wolf: We know he is available for that purpose and we raise no question on the subject.

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Minsky, by whom are you employed?

A. Stanley Warner Management Corporation.

Q. And in what capacity?

A. I work in the film buying department in New York.

Q. And by whom were you employed from July, 1954, to November, 1956?

(4900)

A. Same company.

Q. And in what position?

A. I was the film buyer in Philadelphia.

Q. And where was your office, sir?

A. 1300 Arch Street.

Q. And who was your immediate superior?

A. The zone manager, Ted Schlanger.

Q. And what relationship in the hierarchy of the Stanley Warner Management Corporation did you have to Mr. Nate Fellman?

A. Nat Fellman.

Q. Yes, Nat Fellman.

A. Nat Fellman was employed in our company in New York and he was in charge of the film department in New York City.

Q. How long, sir, have you been with Stanley Warner Company?

A. Well, including the change in the corporate titles,—

Q. Yes.

A.—I have been with the company all my adult business life.

Q. As a film buyer in Philadelphia, what did that position, job consist of? What were your duties, briefly?

A. Well, it meant that I had to negotiate for pictures for the theatres that we had in Philadelphia.

(4901)

Q. And when you say, "negotiate," do you mean in the sense of purchasing pictures from distributors?

A. That is right.

Q. And for how many theatres did you purchase pictures?

A. They were approximately 50 to 60 theatres at that time.

Q. Is that known as the Philadelphia Exchange Area?

A. I would say so.

Q. Now, sir, were you familiar with the existence of something known as the split in first-run Philadelphia dur-

ing the period of your tenure here in Philadelphia as film buyer?

A. Yes, Mr. Sawyer.

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Q. Now, you answered the question, I believe. Did you not answer it, Mr. Minsky? You answered the question, did

(4902)

you not?

A. I didn't answer it fully, Mr. Sawyer.

Mr. Sawyer: Would the stenographer read—

Mr. Wolf: Would you mind repeating it.

Mr. Sawyer: Would the stenographer read the answer.

(Question and answer read as follows:)

"Q. Now, sir, were you familiar with the existence of something known as the split in first-run Philadelphia during the period of your tenure here in Philadelphia as film buyer?

"A. Yes, Mr. Sawyer."

Mr. Sawyer: Very well.

The Witness: I hadn't finished. I am sorry.

By Mr. Sawyer:

Q. Well, we will come to more about it. I am just asking you whether you are familiar with existence of it.

A. Yes.

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(4909)

Q. Was there an agreement between Stanley Warner and Goldman that Stanley Warner and Goldman would not compete with each other with respect to the purchase of Columbia films?

A. It is a very difficult question to answer, Mr. Sawyer. There were pictures that were split in so far as Columbia is

(4910)

concerned. There were pictures that were not split in so far as Columbia was concerned.

I made a bid on a Columbia picture; so did the Goldman people. I didn't get the picture. It went to the Goldman theatres.

So this was one of those instances where, as far as Columbia was concerned, Columbia knew that there were some pictures that were split.

Q. Well, now, you tell us. You name for me, if you will, all of the Columbia pictures during the period of the suit that you can recall on which both Stanley Warner and the Goldman Theatre—

Mr. Ward: That is objected to, sir, because the evidence shows that none of the 87 pictures with respect to which Your Honor has ruled was a Columbia picture that was on the split or the subject of any so-called split.

The Court: How do you answer that, Mr. Sawyer?

Mr. Sawyer: Well, Your Honor, it is—with respect to the existence of the split, proving it and how it worked, I don't conceive we are confined to 87 pictures.

Mr. Ward: Oh, no.

Mr. Sawyer: The existence of a split first-

(4911)

run Philadelphia is certainly—in fact, we were dealing with that when the witnesses from Stanley Warner were on the stand before.

Now, I have got to show, first of all, that there was a split first-run Philadelphia and how persuasive

it was, whether it involved all the pictures or all except one or all except half of them, or whatever it was.

Mr. Wolf: Well, if there was none of the Columbia pictures in which the Viking showed any interest at all, it seems to me it is a matter of utter indifference and completely irrelevant whether as between Stanley Warner and Goldman there was any agreement of any kind, and there was no picture in which Viking was interested that was involved in a Columbia split.

Mr. Ward: The only Columbia picture, sir, which is involved here as between Stanley Warner and Goldman was the subject of competitive bidding between Stanley Warner Company and of William Goldman Theatres Company. There were no other Columbia pictures with which this suit is concerned involved in the pictures which Viking sought that were in any way the subject of any division of product under the term "split" or in any other way and, therefore, it is again embarking on an area which is not in issue in the case.

(4912)

The Court: Well, Mr. Sawyer, assuming there was a split but the split didn't affect any of the 87 pictures that we have heard about; now, how is the plaintiff harmed or how is he deprived of any other picture, no matter how many there are, if he didn't bid on them?

In other words, if there was an agreement, say, Columbia with Goldman and Stanley Warner as to certain pictures being allocated, if one of those pictures wasn't one of the 87, I don't see how the plaintiff could be harmed if he didn't get the picture, because he didn't bid on it. So what is the relevancy in this suit as to whether Goldman got it, Stanley Warner got it, if Viking didn't want it.

Mr. Ward: Or, indeed, if somebody other than Goldman or Stanley Warner got it.

The Court: I will sustain the objection to that.

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(4914)

The Court: Well, you see, Mr. Sawyer, what bothers me—and I have ruled and I still think it is consistent—what difference does it make whether Columbia had any sort of an agreement with Goldman or Stanley Warner about any pictures, hundreds of them, if Viking did not bid on any one of those? Now, any agreement that they may have had didn't deprive Viking of any picture,—

Mr. Sawyer: Well, Your Honor—

The Court: —because Viking did not bid on it.

Mr. Sawyer: Well, Your Honor, the reason I remained silent before is that because we have argued this a

(4915)

number of times. I suppose that—I just can't conceive that you—well, let me put it this way, Your Honor: Being deprived of the pictures upon which we bid, Your Honor, is but one aspect of it of why we are here in this courtroom.

(4921)

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The Court: Objection sustained.

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(4922)

By Mr. Sawyer:

Q. I show you a document which has been marked 187. Will you identify that document.

A. Yes, I can identify this, Mr. Sawyer.

Q. What is it?

A. It is called a cutoff card, which is kept in our office.

Q. What information does a cutoff card contain?

A. It is a bookkeeping card which shows the picture that played in a particular theater. It shows the gross for the picture and shows the film rental for the picture.

Q. Is there a picture on there, GENTLEMEN PREFER BRUNETTES?

A. Yes, there is.

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(4929)

Mr. Wolf:

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With respect to the clarity of the question, the general question of late shows, that perhaps we should raise in a case where they did have some rights, as they have none here.

The Court: How do you answer Mr. Nizer?

Mr. Sawyer: Well, Your Honor, this is not offered for a purpose which has any relationship whatsoever to whether we could play this on availability,

(4930)

whether the distributor was correct, or whether he was acting pursuant to a conspiracy in denying it to us. This is to show a practice which was one accorded to the defendant exhibitors which was never accorded to us. That is the purpose of this.

Now it is greatly reduced in its scope, Your Honor, because it is confined to pictures on which we bid, and I will make an offer of proof at a suitable time as to on what other pictures this was done, and also that this was never accorded the Viking.

Mr. Nizer: Did you demand it?

Mr. Sawyer: In fact, we never even knew about it until discovery, never heard of this phenomenal thing as to late shows.

Mr. Nizer: Well, then you didn't ask for it.

Mr. Sawyer: Well, we didn't know about it.

Mr. Wolf: This is one of the instances of poor management, inferior management on the part of the Viking, they just didn't know about this additional source of a trifling amount of additional income. We are not responsible for the fact that they didn't know that it was possible to make deals for late shows.

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(4934)

By Mr. Sawyer:

Q. Does it also give the percentage terms which were written into the contract, the license contract, for the exhibition of that picture?

A. I would have to see the contract to know that, Mr. Sawyer.

Q. Well, isn't it true that there are noted on there, on the cutoff card, the terms from the contract? Isn't that customary? Aren't they on there?

A. Well, you see, on this card here this shows sometimes changes that are made, if there is a mistake made by the clerk in entering the contract to the card, there would be a change. So actually I don't know if this is a mistake that was made, a change, or if this is the terms of the original contract.

Mr. Sawyer: Could I call for the original licensed contract of GENTLEMEN MARRY BRUNETTES?

By Mr. Sawyer:

Q. In order to save time, does the card show the terms that were actually paid? That is repetitious, but to put it back where we were.

A. Yes, sir.

(4935)

Q. What were the percentage terms of film rental that were actually paid for GENTLEMEN MARRY BRUNETTES?

A. The card here indicates—

Mr. Ward: A little louder.

The Witness: The card here shows that for the first week of the engagement that the regular show was paid for at 40 per cent and the late shows were paid for at 30 per cent.

By Mr. Sawyer:

Q. And for the second week?

A. For the second week the card shows that the film payment was 35 per cent for the regular show and 25 per cent for the late shows.

Q. Do you know, Mr. Minsky, whether or not the percentage which was paid by Stanley Warner for the so-called late shows was specified in the contract between Stanley Warner and the distributor?

A. I don't know. I would have to see the contract, Mr. Sawyer.

Q. By the way, who was the distributor of GENTLEMEN MARRY BRUNETTES?

A. United Artists.

Q. What is a late show?

A. A late show in our business is regularly referred to as

(4936)

a performance that goes on after the normal operated hours. In other words, if we operate normally from 11:00 o'clock in the morning until the last feature going on at 9:30 or a quarter of 10:00, that would be your normal operating hours for the first-run theatre. A show going on after that, a complete show, would be a late show.

By Mr. Wolf:

Q. After what, after the conclusion of the ten—

A. I said after the normal operating hours.

Mr. Sawyer: Your Honor, in that case there is nothing objectionable about what Mr. Wolf said, but I don't think he ought to say to the witness some suggested answer. I would object to it in the future and I think in this case it is not harmful.

The Court: Yes, I think you are right.

By Mr. Sawyer:

Q. When did your late shows usually start at the Stanley, Stanton and Mastbaum, during this period, of course?

A. Well, normally I would say that they would start at 12:00 midnight, or, let me say that the last, that the complete show would start approximately at 12:00 o'clock or 11:00 o'clock. It could be as early as that, depending upon the length of the feature, Mr. Sawyer, would be the controlling factor.

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(4937)

By The Court:

Q. There was a certain amount of film rental paid for the late show; is that what I understand?

A. That's right.

Q. Now, how did you arrive at the amount that you should pay?

A. Well, Your Honor, I would call the branch manager on the phone—

(4938)

Q. Of United Artists?

A. —of United Artists in this particular instance, and say, we would like to run a late show on a Saturday or a Sunday night, whatever the occasion might be.

Q. The same picture?

A. The same picture, sir. And I would explain to him that there are additional expenses in so far as the late show is concerned, we had to keep on an entire staff for the additional hours that were necessary, and to him there would accrue additional revenue. And I would say to him that I can't pay you the same amount of film rental that I normally would pay you and I would like to pay you so much, whatever it might be.

Q. You mean because of—

A. —of my additional expenses.

Q. —of these additional expenses?

A. That's right, sir. And I would make a deal with the branch manager on this particular instance. This is the way it normally occurred.

By Mr. Sawyer:

Q. And was this the matter that was discussed at the time that the picture was licensed?

A. No; it may not have been at all. If it wasn't in the contract, Mr. Sawyer, then, naturally, it wouldn't have been discussed in advance.

(4939)

The problem that we had there, Mr. Sawyer, was that we did not know whether or not we were going to run a late show.

Q. And what would determine that?

A. Well, this would be decided at a meeting.

By The Court:

Q. Let me see if I understand it, Mr. Minsky. On this picture, 11:00 o'clock in the morning until 11:00 o'clock at night, you would have certain expenses, wouldn't you?

A. Yes, sir.

Q. You would have a manager, you would have a box-office attendant and a ticket-taker, and so on?

A. That's right.

Q. Wouldn't you have the same expenses with a show starting at 11:00 o'clock?

A. What happens usually, Your Honor, and I wasn't in so far as the detail and the negotiating contracts for personnel, but there would be additional expenses that were brought about because of the hours that employees would work. They would be paid for a 40-hour week, so to speak, or for whatever hours there would be, and any additional hours over and above that then they would have to be paid additional money.

Q. You mean it would be pay in the nature of overtime?

A. That's right, sir.

(4940)

Q. So that would be additional expense over and above the regular expense of a 40-hour week?

A. I had the same thing, Your Honor. I was an usher in a theatre at one time and if we had to work a late show, we got paid extra for it.

Q. Did you make more money as an usher that you did in your capacity in the exhibition of pictures?

A. May I say, Your Honor, that I was much happier.

Q. You certainly didn't have the problem that you have now.

A. That's right, sir.

By Mr. Sawyer:

Q. Now, were there occasions when the rental for the late show was put in the contract?

A. I would have to see each individual contract.

Q. Well, don't you know whether or not there was an occasion on which a late show was contracted for by Stanley Warner at a lower rate than regular exhibition?

A. Offhand, I don't know. And may I explain by saying that for that period of time that there were hundreds of pictures that were bought, and I am not denying that there were, there may have been, because this is nothing hidden, this is just something that happened.

Q. Are you stating that it is your testimony that as the film buyer for Stanley Warner you do not know as you sit on

(4941)

this witness stand, you do not know whether or not there was ever an occasion when the contract itself specified a special and lower rental for a late show? You do not know that?

A. I am telling you that there may have been, but I don't know. I would have to see the contract; that we negotiated for hundreds of pictures, and whether or not it was in the individual picture I wouldn't remember, especially going back all these years.

Q. Were you in charge at Stanley Warner of seeking adjustments in film rental, and I am not now speaking of late shows, I mean adjustments having to do with the general film rental terms? Was that part of your duties?

A. Yes, it was, sir.

Q. And when you negotiated for adjustments, did you negotiate with the distributors—strike that.

I show you the document which has been furnished by your counsel. Is that a license agreement for GENTLEMEN MARRY BRUNETTES?

A. Yes, it is, Mr. Sawyer.

Q. And is there a provision in there—what is the film rental called for? What are the terms that you agreed to pay United Artists for that picture?

A. Shall I read it to you, sir?

Q. The terms, yes.

(4942)

A. First week 40 per cent scale to 50 per cent; second week, 35 per cent scale to 50 per cent, and for any playing time beyond the second week a percentage of the net box-office receipts in accordance with the attached sliding scale of percentages. We will play the picture for a third week if the picture in the first week grosses $20,000, and we will

play the picture for a fourth week if the picture in the second week grosses $16,000 or more.

Q. Now, the picture in fact played two weeks, did it not?

A. That's right, sir.

Q. So, now, can you answer whether or not the film rental for late shows at the lower rate was included in the contract with United Artists?

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(4943)

The Witness: There is nothing stipulated as to whether or not we will play a late show in this contract, therefore, there are no terms for late shows.

By Mr. Sawyer:

Q. No, don't tell us why there are no terms. I would like to have you answer, if you will, whether or not there is in that contract a specific percentage of film rental which is to be paid by Stanley Warner for the exhibition of the motion picture GENTLEMEN MARRY BRUNETTES. Are there such terms in the contract?

Mr. Wolf: Objected to. It is obvious if they are, they would have been read.

By Mr. Sawyer:

Q. Are there such terms in the contract, Mr. Minsky?

A. There are no terms in here for midnight shows, Mr. Sawyer.

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(4945)

Q. I will rephrase it and give you the same question but listen, if you will, Mr. Minsky.

Does that contract specify what percentage of the gross receipts of the motion picture GENTLEMAN MARRY BRUNETTES are to be paid by Stanley Warner to United Artists? Does it specify?

A. It specifies the terms, yes, sir.

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(4947)

By The Court:

Q. What are the rental terms there?

A. The rental terms, sir, in the contract is the first week at 40 per cent scale to 50 per cent, and the second week 35 per cent scale to 50 per cent.

Q. And you only played the picture two weeks?

A. That's right, sir.

Q. Did you pay the rental as shown in that contract?

A. Yes, sir.

Q. No more, no less?

A. That's right.

Q. But you did exhibit the picture at some late shows, didn't you?

A. Yes.

Q. And you explained how you arrived at the rental for those; is that right?

A. Yes, sir.

The Court: Proceed, Mr. Sawyer.

(4948)

By Mr. Sawyer:

Q. And is that rental for the late show, is it less than the rental specified in that contract?

A. It is a different contract completely.

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Q. Is there any exception in the terms as set forth in that contract which provides for any special kind of show, late show or otherwise, any exception in there?

Mr. Wolf: Objected to. It doesn't have to be an exception to the new contract.

The Court: I think it is admitted that there is nothing in a contract that says anything about the late show.

Mr. Wolf: That's right.

By Mr. Sawyer:

Q. Now, with respect to adjustments of film rental.

With respect, Mr. Minsky, to the motion picture HELL'S ISLAND, I show you a document which I will ask to have marked P-188—

(4949)

(Cut-off card No. 35, distributor Paramount, for the season 1954-1955, theatre Mastbaum, was marked Exhibit P-188 for identification.)

—and I will ask you with respect to—first of all, will you identify the document.

• • •

Q. First of all, I ask you what that document P-188 was that I showed you.

(4950)

A. This is a cut-off card for the Mastbaum Theatre for the Paramount pictures.

Q. And does it have on there the picture HELL'S ISLAND?

A. Yes, it does, Mr. Sawyer.

Q. And does it indicate to you that an adjustment was made on that motion picture by Paramount?

A. Here again, to keep it clear in my mind, too, if you don't mind, I will have to see the contract.

Q. What does it say, the next notation?

A. It says here HELL'S ISLAND, the date of the contract is May 2, and it says 25 per cent, and then there is Rev 20 per cent.

Q. What does Rev mean?

A. It could be revert, it could be revise. This is what the clerk put on the card.

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(4951)

Q. Well, what do you have to do with cut-off cards, Mr. Minsky?

A. Well, I have nothing to do with them personally, Mr. Sawyer, except this is a record that is maintained in the film department which I was in charge of.

Q. Of which you were in charge?

A. That is right.

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(4952)

Q. Now, it has been stipulated by your counsel that there was an adjustment made on this picture—

Mr. Wolf: Of $296.

By Mr. Sawyer:

Q. —of $296. Did you negotiate with Paramount with respect to this adjustment?

A. I probably did. I don't know; but I would assume that I did. I don't know if I did or didn't.

Q. Well, on what basis did you seek an adjustment of this picture? Do you recall the picture?

A. Do I recall HELL'S ISLAND?

Q. Yes.

(4953)

A. Yes. I do.

Q. Now, on what basis did you seek an adjustment from Paramount?

A. Well, I went to Paramount after the picture had completed its engagement and said to them, "In our big beautiful Mastbaum Theatre we grossed $5300 a week,

which is a very, very bad gross, and I think that you should adjust the picture."

Paramount said that they would.

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(4956)

Q. Now, I am inviting your attention to the motion picture SOLID GOLD CADILLAC, Mr. Minsky. You recall that motion picture?

A. Yes; I do, Mr. Sawyer.

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(4965)

Q. Now, Mr. Minsky, since we have had this explanation, perhaps I can cut through, straight through. Did you pay a guarantee on this picture?

A. I don't know. I would have to see the contract to tell you if there was a guarantee or if it was—

Q. Well—

A. —what it was.

Q. Well, I am not asking you whether it was on a contract you were required to pay a guarantee; I am asking you whether or not you know whether or not in fact Stanley Warner paid a guarantee.

A. I would have to see the cut-off card, Mr. Sawyer, to know that.

Q. Now, I show you, I think we can agree, a cut-off card of Stanley Warner, including, among other pictures, the picture SOLID GOLD CADILLAC. Is there a notation on there with respect to a guarantee?

A. Yes. There is, Mr. Sawyer.

Q. And what does it show?

A. It says here 25,000 guarantee.

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(4966)

Q. Now, did you participate in the negotiations for licensing SOLID GOLD CADILLAC?

A. I don't believe so, Mr. Sawyer. I didn't sign the contract. It was signed by somebody else.

Q. Do you recall whether or not, aside from the fact that

(4967)

you didn't sign the contract, whether or not you participated in those negotiations?

A. I don't think so, Mr. Sawyer. It is dated the 20th of August, and I was not in Philadelphia at that time in charge of department.

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(4970)

The Court: Now, first of all, let us dispose of P-1.

Mr. Sawyer: Oh, you want to do that first.

The Court: Very good.

Now, I will hear from Mr. Sawyer, what it is, what he purports to show by it, and why in his judgment he considers it to be competent, and then I will hear from Mr. Wolf as to why he thinks it is objectionable.

Mr. Sawyer: Well, I will be brief, Your Honor, if I can, and I will try to be very brief.

That document is a document of the Stanley Warner Company. As Your Honor will observe, it appears to be excerpts from a looseleaf notebook. There are typed thereon on that document lists of pictures divided by distributor. Those lists of pictures are pictures on the split.

(4971)

That is, if you will look at that document, it is self-evident that what you have there are two lists, one saying, I think, "Ours," and the other says, "Goldman's," because it is Stanley Warner's record, and under the column labelled "Ours," it has motion pictures by title and by month, and under the column labelled "Gold-

man," it has other motion pictures, Paramount being the first. Then comes Warner Brothers. Then there is a column headed, "Columbia split," and "Metro split," and "RKO split; United Artists split," and so on.

I might just say in passing, if I recall, Mr. Fellman said that the product of RKO was not being split, and this would impeach him in itself, this document, but that is a collateral purpose, Your Honor.

The purpose is that whatever effects there may be as to the split, whether the split is legal or illegal—and believe me, Your Honor, I am not going to say a word as to that again; we have argued it many times as to whether it is or not—I do not think that I am constrained to say, Your Honor, that we have practically no law—practically no law in the United States on this question as to, first of all, whether the split is legal or illegal per se.

The Court: Except the Brown case.

Mr. Sawyer: Except the Brown case,—

(4972)

The Court: Yes.

Mr. Sawyer: —which is, Your Honor, I think a slender reed, it is quite a different situation, but even there you have got one case only—there is almost no law—and we certainly have no law as to whether or not a split which might be illegal under one set of circumstances, or legal, shall we say, is legal under another.

Now, the Brown case, I will not certainly argue now, and we still hope to put it in a brief.

The Court: No. Well, I have decided that,—

Mr. Sawyer: Yes, sir.

The Court: —and it is admissible.

Mr. Sawyer: That it is admissible.

The Court: That is right.

Mr. Sawyer: Well, it seemed to me that that is right that pursuing the admissibility of this split, I have got to show that it existed and that it—because it is admissible as a device, as a picture, a part of first-run licensing in Philadelphia, then it isn't very meaningful to just take individual pictures—in fact, it takes much longer—in which we bid and say, "Was that picture under split?" and "Was this picture on a split?"

Now, here is a document that shows that the motion pictures—and I think everyone is included there—

(4973)

of all of the defendant distributors were on the split.

I want to question the witness as to whether—as to these motion pictures, as to whether or not when this list was made up it didn't indicate to him—he is the film buyer—that he was not to seek to license ROMAN HOLIDAY, for instance—I am just taking the first one—WAR OF THE WORLDS, KNOCK ON WOOD—that the arrangement was such that it was understood that that meant that he wasn't to go out and compete for those pictures, and that Goldman, by the same token, was not to come in and compete for BRIDGES AT TOKO-RI, which is over here and says, "Ours."

Actually, on that, I would ask him how it came to pass that BRIDGES AT TOKO-RI and THE COUNTRY GIRL was shifted over to the Goldman side of the split, as they were, what—

The Court: Well, now, there I am inclined, without hearing from Mr. Wolf, that since I have held that you can show the split, but haven't I already ruled against you as to pictures on the split outside of the 87?

Mr. Sawyer: I think you have ruled, ruled against me with respect to almost every feature of motion pictures on which we didn't bid. If Your Honor simply

says that that ruling applies to showing any effects of split outside the 87, then, of course, Your Honor has so ruled.

(4974)

The Court: I so rule, but—

Mr. Sawyer: It seemed to me that—

The Court: —why is this competent as to the pictures, the 87 pictures?

Mr. Wolf: Your Honor, I assumed that you would ask that question, and we have prepared a list which shows exactly what that shows as to every picture of the 87 which is involved in this case. It will show that this involves 44 of the 87 pictures; that is, those in which the Viking was interested and was—

The Court: In other words, 44 of the 87 were on the split?

Mr. Wolf: Were on the split.

The Court: Were on the split.

Mr. Wolf: And it will—this skeleton list which I have prepared and which I showed Mr. Sawyer in the hope that it would avoid the necessity of this argument and asked him if he would agree that it showed every picture of the 87 in which he was interested, shows who got it, showed on which side of this split it had been indicated, and showed the reason, I think, he didn't want it in, that 17 of the pictures on this split in which he was interested, he got, and there were only eleven—

(4975)

The Court: Well, I understand.

Mr. Wolf: This, as I say, showed everything except the pictures in which he showed no interest whatever, and to allow the jury to get this vast list, most of which, as I say, he hadn't the slightest interest in, must be misleading and prejudicial.

The Court: I have already ruled on other pictures and I think the reasons for my ruling are already in the record, and it still applies to the split, and, I repeat, that I do not see how it affects the Viking in any way if they are or are not on the split, if Viking did not bid for them.

So therefore I am prepared to rule that I will sustain the objection as to P-1, but will admit the evidence from this record as to all pictures, all of the 87 pictures.

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(4981)

The Court: Very well.
Now what is Exhibit 2?

Mr. Sawyer: 2, 3, and 4, Your Honor, are the same in this sense. The No. 2 refers to Universal, No. 3 to Warner, and No. 4 to Fox. These have been marked by those numbers, 2, 3, and 4.

These documents are Stanley Warner's record, entitled: "Notice of Deal or Modification of Terms," and they have columns that first show the theater in which the motion picture played; then the name of the motion picture; then the original terms, that is, unless there has been an error here, those terms on which the picture was licensed, the percentage it shows; then the revised terms; and then the initials of the person making this. And that is the same form, P-2, for pictures of Universal, P-3 pictures of Warner Brothers, and P-4 pictures of Twentieth Century-Fox.

Now, these were offered to show that Mr. Minsky, who has said that he negotiated for adjustments on these pictures, negotiated with the distributors for pictures throughout the Philadelphia exchange area, and when I say "pictures," I should say perhaps theaters throughout the Philadelphia exchange area.

I believe his testimony today was that he was the film buyer for some 60 or 70 theaters in the Philadelphia

(4982)

exchange area, and one notes from these exhibits that Ardmore, Commodore, Diamond, Fairmount, Kent—I guess that is Majestic—and so on, a number of theaters owned by Stanley Warner, are included in these records of adjustment.

Now, what is the purpose of that? The purpose, Your Honor, is to follow up something which very early in the case we had some discussion about, and that was the buying power aspect of the defendant exhibitors.

It was our contention that buying power and the fact that the defendant exhibitors have theaters which are parts of very large chains was relevant, and Your Honor let me mention to the jury, although with some restrictions, but in passing, I think, that fact of buying power, and I said that there would be, as the case developed, some other evidence, some testimony with respect to buying power.

Now, the implication here and the inference which the plaintiff seeks to draw is that buying power comes into play, among other terms, and it comes into play in a number of respects, but one place, and this is an example where it comes into play, is in the seeking of adjustments.

We think that human nature being what it is, that when a person seeks an adjustment, and he sits at the table representing 70 theaters throughout the Philadelphia exchange area alone, he has a buying power with respect to the distributor

(4983)

which may induce the distributor to treat him more favorably than the man who has but one theater.

That is the purpose of P-2, 3, and 4.

Mr. Wolf: Now, may it please the Court, P-2 is from Universal—

The Court: May I see it?

Mr. Sawyer: These are all photostats.

The Court: All right.

Mr. Wolf: P-2 purports to be a Notice of Deal or Modification of Terms.

There is not a picture mentioned on P-2 which is included in the 87 or on which the Viking ever displayed any interest, No. 1.

Mr. Ward: May I join in that, sir, on behalf of Universal, because, as Your Honor has firmly ruled on at least two previous occasions, Your Honor has restricted any testimony with respect to adjustments to pictures within the area of the 87. There is no more definitive a ruling than that in this case.

And therefore since this goes beyond the scope of those pictures and jumps to a conclusion for which there is no evidential foundation, in addition to what I have already said, I join in the objection.

The Court: Well, Mr. Ward, you may be right.

(4984)

I have limited it to the 87 pictures, on superior bids—

Mr. Ward: Your Honor, it is also, sir—

The Court: —I have limited it as to the split, because I said in my judgment I do not see what difference it makes.

Now, suppose the plaintiff can show that there were adjustments given Stanley, say, first, on 95 per cent of the pictures which it got. Of course, this is just a few of them, about 15 or 20 here. But that in the 87 adjustments were not granted to anybody. Would

that not tend to show that perhaps, if you can prove it, as one of the elements in the conspiracy, a distributor would say to Stanley: Now, look, the Viking bid on this picture, and you got it, or vice versa—of course, Viking says they never got adjustments practically. But suppose—

Mr. Ward: We have shown they got eleven.

The Court: —Columbia says to Stanley: Now, look, Viking bid on this, and we awarded it to you, so we are not going to give you an adjustment on this picture, but on the next picture you get, where Viking doesn't bid or negotiate, we will take that into consideration and give you an adjustment. Wouldn't that indicate in a measure that there was some preference?

Mr. Ward: No, sir, I think not, and this is

(4985)

really a reargument attempted by counsel for the plaintiff of the same subject that we reviewed before.

Here is Your Honor's ruling after an exhaustive argument and reargument of this very point, at page 3348:

"No. 5, as to adjustments, amending contracts, making payments back to the exhibitor, lowering rentals, and so on, I limit all evidence as to that to the pictures actually sought by the Viking."

The Court: What page is that?

Mr. Ward: 3348, Your Honor.

Mr. Wolf: Here it is, Your Honor. I picked it up.

The Court: Well, I wanted to look at the rest of it. Do you have it there?

Mr. Ward: Yes, sir.

I might also add, before Your Honor starts to read, if I may, that the offer made by Mr. Sawyer is not

the offer as Your Honor stated it in your postulated point to me, sir.

There is no offer to prove here about 95 per cent of adjustments being granted.

There is no offer to prove that adjustments were granted on bid pictures.

This offer has to do with adjustments granted

(4986)

on theaters not even in Philadelphia, not even involved in the orbit of this case, to show some supposed theory of buying power, for which there is simply rumination and whatnot.

The Court: Let me read it.

I am reading now, Mr. Sawyer, page 3347.

Mr. Sawyer: Thank you, sir.

The Court: Of course, I have had a brief on this, because then the defendants presented those cases which held that you cannot complain about any pictures you did not bid.

Mr. Sawyer, of course, was on the other side and he said it was limited with respect to complaint.

Now, so far as adjustments are concerned, let me read this to see what I felt about that at the time that I made this ruling.

Mr. Sawyer, why haven't I really decided this very point?

Mr. Sawyer: Your Honor, I think Your Honor has decided the point that Your Honor I think on your own motion raised just a few moments ago, I had hoped that—and after all one can always change a ruling—that Your Honor would change the ruling in this respect, because I thought that Your Honor had so clearly perceived the very reason why we thought orig-

inally we should have the right to put in evidence of the

(4987)

treatment of the defendant exhibitors with respect to adjustments, and other things, but adjustments, when Your Honor pierced right to the heart of the thing and said: Suppose they grant adjustments on a wholesale scale to Stanley Warner—since that is the one, it would be the same thing with Goldman—on other pictures, wouldn't that be a way of taking care of them?

Now, I believe Your Honor has ruled on that. I believe most sincerely that Your Honor ruled erroneously on that point, but I believe Your Honor ruled on it. I would hope that Your Honor would pursue in the thinking that I am sure you do about this case, when we are not here in court, as well as when we are here, and permit me sometime in this case to show that very thing for this very reason.

But I do agree with Mr. Ward, that when Your Honor voiced that particular thought, I think that Your Honor was voicing a very penetrating thought, but not the point as to which or for which P-2, 3, and 4 are offered. And therefore I do agree that Your Honor has ruled, but I do not think that I was trying to get Your Honor to change that ruling by my offer of 2, 3, and 4, if I haven't talked too confusingly.

(4988)

The Court: Why do you offer P-2, 3, and 4?

Mr. Sawyer: My 2, 3 and 4 are offered on a different point, Your Honor. If I may say, first of all, what they are not offered at all for, very briefly. They are not offered to show the concept that Your Honor mentioned. They are offered to show, however, Your Honor, just the point that they form an example of the power of Stanley Warner vis-a-vis distributors,

whether it is seeking adjustments or anything else in this case, it is adjustments.

In other words, it is a part of proof on buying power.

Here is a witness who goes constantly, presumably and nobody blames him for going I might add, to the distributors and he seeks adjustments. If he seeks adjustments for the Mastbaum or the Stanley or the Stanton, he is in perhaps one position. If he, when he comes in seeking adjustments for the Mastbaum, for instance, on a particular showing—we had this HELL AND BACK, I think was one very poor gross—he is in a position far different than if it becomes known, and we have in evidence the fact that he is in there representing 60 or 70 theatres in the Philadelphia exchange area, and that the distributor has got to give him consideration that he wouldn't give to an independent theatre, the Viking.

(4989)

Now, the relevance is to put in some proof in support of my contention made in the opening that buying power of these chains is relevant, that it is the buying power of a huge exhibitor chain or the people who own a number of theatres in this exchange area, that is the lever by which the distributors were induced first of all to accede to the split, which in itself is against their economic interest since bidding tends to raise the price of film, and, secondly, to do certain other acts with respect to Viking which were against their economic interest, one of them is the turning down of bids.

Mr. Wolf: Let's limit it to what the particular exhibitor is supposed to show.

Mr. Sawyer: That is the relevance of 2, 3, and 4. It is an example of buying power and that is all it is offered for.

I just say parenthetically, Your Honor, that I did not suggest again to reargue the question of the adjustments.

The Court: Mr. Ward, aside from the fact that you argue that I have already decided, have you answer to what Mr. Sawyer says that this is not—of course, I was thinking in terms of superiority and inferiority when I made my ruling. Of course, I included advertising adjustments, too.

(4990)

Well, now, from the point of buying power—

Mr. Ward: The same argument was made before and labored by Mr. Sawyer repeatedly.

The Court: Was it?

Mr. Ward: There is not a word in the pretrial statement to support this theory and the argument lifts itself by its bootstraps simply because—

The Court: Can you show me that argument in the record?

Mr. Nizer: Excuse me. May I indicate—we will find it in a second. Have you got it? His Honor has the book.

The Court: What is the page?

Mr. Smith: Pages 3230 to 3232 is where Mr. Sawyer made the argument.

The Court: 3230 to 3232?

Mr. Smith: Right, sir. That is where the argument was made by Mr. Sawyer.

The Court: All right. Now, just let me read it. Are we talking about the 87 pictures?

Mr. Smith: Beyond the 87, Your Honor. That was the point of Mr. Sawyer's argument.

The Court: I don't see, Mr. Smith, where anything is said about the economic buying power.

(4991)

Mr. Smith: No, Your Honor; that is all on the adjustments granted beyond the 75 pictures.

The Court: But there's nothing in here about that.

Mr. Smith: Not in that area.

The Court: In this argument about the economic buying power?

Mr. Smith: No, sir. This is as to adjustments beyond the 87 pictures.

The Court: Yes, adjustments and advertising.

Mr. Nizer: Your Honor, there must have been encompassed in the many arguments that were had here the question of buying power because inherent in Mr. Sawyer's argument at all times was that this showed favoritism to a stronger buyer. But Your Honor will recall in that connection we pointed out what a terrible ordeal we were heading in for if every time there was an adjustment granted to some theatre some other place, not involved in this suit, on a picture not involved in this suit, under Your Honor's rule, that we would have to go into the particular showing of that picture and demonstrate that it was a reasonable exercise of judgment and not of discriminating conduct, and Your Honor was very mindful of that, and that was briefed and argued

(4992)

and after Your Honor decided, and Your Honor will recall that this was after Mr. Sawyer challenged Your

Honor's decision on this much earlier in the trial and Your Honor permitted a full-scale argument for a second time, and then made these definitive rulings, and the ruling on this matter is one sharp, concise sentence:

No. 5, as to adjustments, and entering contracts, in making payments back to the exhibitor, lowering rentals, and so on, I limit all evidence as to that to the picture actually sought by the Viking.

And on page 3349, Your Honor, you said

Now, let's all make a note of it because I think I have made it clear so that at any rate we will know in the future, without having to search through the notes of testimony, whether it be two weeks or so, that we will have it right in front of us.

Here we are.

Mr. Ward: Exactly two weeks.

Mr. Nizer: Your Honor's prediction has come true even in this respect. We are two weeks away. A new question is raised I think for the fourth time by Mr. Sawyer and now we have the notes in front of us.

Mr. Sawyer: Mr. Nizer knows it isn't for the fourth time, not about buying power.

(4993)

Mr. Nizer: No, Mr. Sawyer, you have interrupted, and I ask for the privilege you have asked.

The Court: Go ahead.

Mr. Nizer: I say it is for the fourth time because before Your Honor made the original ruling there were two occasions on which Mr. Sawyer argued at full length, I don't remember the words buying power, we will look it up and give it to you tomorrow—I believe we can find it. But clearly the whole purpose of his argument was, or there wouldn't be any purpose to it, that it is a strange thing that Stanley gets all these

adjustments, they are the powerful chain kind of argument in business, with the flag unfurled again about the word "chain," and whereas poor Viking doesn't get it. If that doesn't in itself incorporate buying power, there is no purpose to the entire argument. That is what he means.

We are not favoring Stanley Warner says Mr. Sawyer just because we happen to like their executives. He says this is a buying presure upon us. This has been his argument all along, whether I find those words or not. That has been instinct in the argument that is made and in their briefs. And I believe I will find those words. Whether we find those words or not, the purpose of limiting this case to the instances in which the plaintiff made a bid or offer

(4994)

for the picture is as valid now as it was when Your Honor told us to make note of this finding and call it to your attention. Just as valid. This would open up collateral issues of unlimited areas.

Your Honor recognized that at one point during an argument. You said, "Well, what will they have to do then in this connection, go into each one of these adjustments and show that it was bona fide rather than some ulterior motive?" and, indeed, that is what we would have to do. What were the receipts? How long did it play? How much of a loss did the theatre take, if any? Did you do this for other theatres like the Trans-Lux and the other non-associated theatres, or did you only do it for Stanley? And the result of all that is a series of collateral trials which we all agreed, I thought, finally, were inadvisable as well as improper.

I cannot see how this matter can be revived again simply by using the magic words "buying power." Whether they were used or not, the purpose of the ruling is to confine the case to the issue on which the

plaintiff made a demand. Under the traditional doctrine, Your Honor, that unless a plaintiff makes a demand, under that J. J. case, it doesn't matter even if the conduct were very wrong, it isn't his grievance.

Your Honor will recall that in the argument

(4995)

I used the analogy, which also brings back to mind that argument, that he cannot throw the cloak of the Attorney General around himself and hold forth in the courtroom about the public weal. That isn't Mr. Sley's role in this case. He would hardly fit it, and it isn't his role. He is a private litigant, as I once said, and this shows that that argument was made, who must prove personal injury to himself in his business or property, as the statute reads. And since the matter of adjustment with respect to pictures, as Your Honor has said more clearly than anyone else can, since the matter of adjustments of pictures in which he had no interest cannot affect him in his business or property, it is irrelevant whether with respect to buying power, advertising, general prejudice, local prejudice, foreign prejudice, Communism or anything else. It doesn't matter what the reason was that they acted the way they did with respect to a picture in which he had no interest.

And so I do ask Your Honor to adhere to the ruling that you have so clearly made, and that we can go forward with other completion of the issues.

The Court: Mr. Sawyer.

Mr. Sawyer: Mr. Nizer has had success with the argument about adjustments so he makes that argument over again and that isn't what we are here talking about.

(4996)

Now, let's put an end to it, Your Honor. I can put an end to it in two sentences.

I offer 2, 3 and 4 to show that when Mr. Minsky went to negotiate for adjustments—I don't care whether they are on pictures we bid or didn't, but that will be just as true on pictures that we bid on, that he sat down and represented a chain, whatever it is, 60 to 70 theatres in Philadelphia, and that is all I offer it for. I am not going to go into whether the Erlen or some other motion picture theatre got an adjustment of what percentage. I don't care about that.

The significance of these documents are that he has got here adjustments for a whole series of theatres in the Philadelphia exchange area. I am not reopening the other question at all.

That is all that I offer it for. If Your Honor rules it out, I will make an offer of proof on it, and we go on to something else, but it isn't offered for any of this other business.

The Court: I am prepared to rule, Mr. Sawyer.

I will sustain the objections as to 2, 3, and 4. I will adhere to my ruling as to the adjustments proposed to be proved out of those exhibits and limit all proof of

(4997)

adjustments to the 87 pictures involved.

I repeat, the reason for my ruling is that I feel that Viking could not be affected by adjustments given to any of the defendant exhibitors on other pictures, other than what pictures Viking bid on and, of course, that includes the 87.

Otherwise, if we went into adjustments or advertising of all other pictures, adjustments awarded to Stanley or Goldman, we would have to go into the reasons and I don't see how Viking is affected. That is the reason for my ruling.

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(4998)

THIRTIETH DAY

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(5000)

TED MINSKY, recalled.

DIRECT EXAMINATION (Continued)

By Mr. Sawyer:

Q. Mr. Minsky, during the course of your tenure here in Philadelphia did you on behalf of Stanley Warner make any bids or offers using a house expense as a part of the bid?

A. Yes, we did, I believe, Mr. Sawyer.

Q. They would be the kind of deals which were described as 90/10 over a house nut, or 70/30/10 over a house nut?

A. That was the common terminology, I believe.

Q. What figure did you use for the Mastbaum Theatre?

A. I wouldn't remember that.

Q. Was it $10,848? Does that sound familiar?

A. Yes, it does sound familiar.

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(5003)

Q. Now, the Mastbaum, however, I recall and you recall that $10,848 was the figure used by the Mastbaum Theatre when it made that kind of a bid.

A. I believe so, but I don't remember, and, of course, I would have to see the actual contract in order to be sure.

(5004)

Q. Well, subject to check by your counsel, I think we can agree that we had that figure, and that the Mastbaum did make such bids.

Now, on such bids did that mean that before the distributor was to receive any percentage, whatever it might be, the Stanley Warner Mastbaum was entitled to take the first $10,848 that came into the boxoffice; is that what that kind of a bid means?

A. That type of bid would mean—now, are you talking about a specified type of deal, a 90/10 deal?

Q. Either 90/10 or 70/30 over a house expense figure.

A. Yes, that is what it usually means, that of the first gross that comes into the theatre, if the deal specifies $10,848, the theatre was to receive that first.

Q. How was that figure of $10,848 arrived at?

A. This was a figure that was supplied to me by our accounting department as an agreed upon figure for the theatre.

Q. With whom had it been agreed upon, when you say "agreed upon"?

A. Well, in terms of a bid, so to speak, if there was a bid on a picture, this was a figure that was agreed upon by our accountants as our expenses.

Q. But you didn't mean it was agreed upon—that there was any agreement with any of the distributors that that was an

(5005)

accepted figure?

A. In terms of a bid, sir?

Q. Well, in any terms. Did you have an agreement with any of the distributors that the figure of $10,848 was to be the house expense figure for the Mastbaum Theatre?

A. No, sir. In making a bid there was no discussion with any distributor. So this was a figure that naturally was prepared by us.

Q. Did the distributors ever ask you to itemize that figure?

A. I don't believe so, Mr. Sawyer.

Q. Did you just consider it as being a figure?

A. No, we considered this a figure, an expense figure for the theatre. This was the figure that our accountants gave to me.

Q. And did you ever have occasion on any bid to list the expenses which made up that $10,848?

A. I don't recall any, Mr. Sawyer.

Q. Do you recall whether or not any distributor ever came in to audit that figure to see whether it was actually your expense for the week?

A. Not to my knowledge, sir.

Q. Isn't it true that from week to week actual weekly expenses would vary, your expenses in one week would not be the same to the penny as your expenses in another week, is that

(5006)

so?

A. Well, the figure of $10,848 that you are talking about is an average figure that was used, Mr. Sawyer, over a period of whatever time that they had set this figure up, be it 13 weeks or 26 weeks, so that in terms of averages it would pretty much strike a fairly good average. This is the way that they figured it out.

Q. All right. Then the answer to my question is, however, from any one given week to another given week this figure would vary?

A. I don't know as to how much it would vary, Mr. Sawyer.

Q. Well, don't you take on extra ushers when you have a really big picture, a blockbuster?

A. Oh, yes, I would imagine.

Q. So that your expense just in terms of ushers varies from week to week, depending on the magnitude of the picture you are showing; is that correct?

A. I imagine that there would be an additional expense in the first week that you may not have in the second week, Mr. Sawyer.

Q. And did this figure vary from year to year as the salaries of your personnel in the theatre increased?

A. The figures that we have I believe, Mr. Sawyer, change as the expenses change.

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(5014)

Q. Mr. Minsky, was it your policy during your tenure in Philadelphia to leave Twentieth Century-Fox pictures to the Fox Theatre?

A. It wasn't a matter of policy, Mr. Sawyer. The Fox Theatre—

Q. Is your answer no, it was not your policy, then you may explain, if you can.

A. Let me say this: That as far as the Fox Theatre was con-

(5015)

cerned the Fox Theatre had always played Fox pictures as long as I could remember, and it was a matter of business judgment that if the Fox Theatre played Fox pictures we were playing the other companies' pictures.

Q. And could you answer my question as to whether or not you had a policy as a Stanley Warner film buyer of not seeking the pictures of Twentieth Century-Fox?

A. I would say that we did not seek the Fox pictures, normally speaking.

Q. And what were the circumstances, if any, under which you would seek Fox pictures?

A. Perchance, if a Fox picture was going to be available and we saw by the way the Fox pictures were lined up in the Fox Theatre, that he wouldn't be able to play all of those pictures, that may have been an occasion to do that.

Q. And would you talk to Seidenberg about whether or not he was lined up with pictures at times?

A. I had talked with Seidenberg to find out what the grosses were, how he was doing, you know, like people in

business consult with one another, about how are you doing and how am I doing.

Q. And you talked to him, did you not, about whether or not he wasn't, as you say, lined up with more pictures than the

(5016)

Fox Theatre could play?

A. No, I don't remember discussing that with him at all.

Q. And were there times when the Fox Theatre had so many pictures from Twentieth Century-Fox that they just simply couldn't play them all?

A. There may have been; I don't remember. It is back seven years ago.

Q. Well, you testified that that was the case on occasion, have you not? You so testified, didn't you, in your deposition?

A. I don't remember. If I did, that is the way it was.

Q. And what would you say the main problem was with the Aldine Theatre?

A. Well, the problem with the Aldine Theatre is the same problem that we have, that we had, rather, with all of the theatres in first-run Philadelphia, mainly, that there was a tremendous dearth of product. There weren't enough pictures to go around. And during the time of 1954-1955, in that area, when television had really made its impact on the public—

Q. Mr. Minsky, didn't you testify—

Mr. Wolf: He is going to tell you what the problem was. You asked him.

The Court: Let him finish.

(5017)

The Witness: During the time of 1954 and 1955, when television had made a tremendous impact upon

the people who were seeking entertainment, and with the reduction in the number of pictures that were available for first-run Philadelphia, the Aldine Theatre as well as all the other theatres were affected.

By Mr. Sawyer:

Q. Now, didn't you testify, Mr. Minsky, that the Aldine Theatre was a tremendous problem to us because it wasn't air-conditioned?

A. Certainly I testified that the Aldine Theatre was a problem because of air-conditioning. But, certainly, in the matter of good business judgment, Mr. Sawyer, if air-conditioning was the only problem, our company officials would naturally have put air-conditioning in because—

Q. Now, you don't know that, do you? You explained a moment ago that you are not an officer.

Mr. Wolf: You say he doesn't know it. Why don't you ask him.

Mr. Sawyer: I am entitled to some leeway in cross-examination.

By Mr. Sawyer:

Q. You don't know that, do you, Mr. Minsky?

A. I was going to finish by saying, Mr. Sawyer, that we

(5018)

still had a problem with the Aldine Theatre during the entire winter when air-conditioning was not a problem.

Q. So that your testimony, and I read from your testimony at page 101.

"A. The Aldine Theatre—"

The question doesn't elucidate the answer.

"A. The Aldine Theatre was always a tremendous problem for me as a buyer. The Aldine Theatre was not air-conditioned and as such it always posed a tremendous problem to buy pictures for."

Mr. Wolf: Won't you continue?

By Mr. Sawyer:

Q. You cited that there as your main reason, did you not? That would be the gist of that answer.

Mr. Wolf: Will you continue?

Mr. Sawyer: I will continue, yes.

The Witness: I cited that as one of the problems because, if I remember, Mr. Sawyer, as my testimony there continues—

By Mr. Sawyer:

Q. You went on to say, did you not, that they were also problems of a number of first-run theatres?

A. Problems—

Q. When asked the question on deposition the first thing

(5019)

that came to your mind, when you were asked this question then was the fact that it was not air-conditioned, wasn't it?

A. I don't know. If that is the way it was, Mr. Sawyer, then that is the way.

Q. Well, I read it.

• • •

Q. "Q. Because of the air-conditioning."

I will read it in full context.

"A. The Aldine Theatre was always a tremendous problem for me as a buyer. The Aldine Theatre was not air-conditioned and as such it always posed a tremendous problem to buy pictures for.

"Q. Because of the air-conditioning?

(5020)

"A. I would say that because of the air-conditioning and also because of the fact there were so many theatres first-run Philadelphia that the Aldine was, be-

cause of the air-conditioning and the pictures that had played and had not grossed well, that it became the bottom of the ladder, so to speak as far as the distributor's choice for pictures first-run Philadelphia."

That is your full answer, is it not?

Mr. Wolf: No, it isn't.

Mr. Rome: It goes on for almost a page, Mr. Sawyer.

By Mr. Sawyer:

Q. "Q. And why had it not grossed well in the pictures, because you had not put in a top selection of pictures there because of the lack of air-conditioning.

"A. We operated at that time the Boyd Theatre, we were operating the Stanley Theatre, we were operating the Mastbaum and the Stanton Theatre and with such a dearth of deluxe product available for first-run Philadelphia we played pictures in whatever theatres the distributors would sell them to us.

"Q. And they wouldn't put their top pictures into the Aldine because it lacked air-conditioning, was

(5021)

that right?

"A. This is one of the reasons they had. Very truthfully, I don't know of any other thoughts that they may have had in their minds."

Mr. Wolf: "I don't know any of the other—"

Mr. Sawyer: "—I don't know any of the other thoughts they may have had in their minds."

Mr. Rome: It still continues.

Mr. Sawyer: Well, we can sit here and read his deposition, Your Honor, for the rest of the morning.

"Q. So that was the only reason that you know?

"A. That would be one of the reasons. And the fact that after a period of years with me being unable to buy pictures for the Aldine Theatre because of the dearth in product, it became a pattern for the distributors to say, no, he doesn't want to play the Aldine. This is the same problem that I had in the Mastbaum Theatre. The distributor would determine in his own mind that he didn't want to play big theatres, which is a beautiful theatre to play a motion picture in, as you well know. These were the problems that we had in a number of theatres first-run Philadelphia."

Mr. Wolf: That is enough.

• • •

(5023)

The Court: No. I agree that is not proper, what the distributors thought. Did he have any conversations with any of the distributors or their agents about the Mastbaum no longer should have pictures because of its size or whatever you want to show?

By Mr. Sawyer:

Q. Can you answer that question of His Honor?

A. I think so. We had a problem in buying pictures for the Mastbaum Theatre. The Mastbaum Theatre in my opinion was one of the most beautiful theatres that Philadelphia has ever seen but, nevertheless, in this market that we were doing business in, there was a tremendous problem to buy pictures for the Aldine as well as for the Mastbaum, as well as for the Stanley, and all of the theatres downtown Philadelphia because there just weren't enough pictures to go around, sir.

Q. That isn't the explanation you gave as to your difficulty

(5024)

in buying pictures for the Mastbaum in your deposition, is it, Mr. Minsky?

A. If you would read from the deposition, Mr. Sawyer, I would find that is what I said, sir.

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(5025)

Q. I think the witness can answer, however, in this portion that I read you, and I will subsequently read it all, and I have read this before, the entire question, that is one of the reasons I didn't do it—

Didn't you testify that the reason you had difficulty with the Mastbaum Theatre wasn't because of the general shortage of product which you allege but rather that "The distributor would determine in his own mind that he didn't want to play a big theatre, which was a beautiful theatre to play a motion picture in, as you well know."

Did you so testify?

A. Yes, sir.

Mr. Sawyer: Do you want me to read again that whole answer?

Mr. Rome: Yes.

Mr. Sawyer: (Reading)

"Q. So that is the only reason you know?

"A. This would be one of the reasons, and the fact that after a period of years with me being unable to buy pictures for the Aldine Theatre because of the

(5026)

dearth of product—or the Aldine Theatre because of the dearth of product, it became a pattern for the distributors to say, no, he doesn't want to play the Aldine. This is the same problem I had in the Mastbaum. The distributor would determine in his own mind that he

didn't want to play a big theatre, which was a beautiful theatre to play a motion picture in as you well know, and these are the problems that we have in a number of theatres first-run Philadelphia."

• • •

(5027)

Q. Did there come a time when the distributors indicated to you, Mr. Minsky, that they preferred to play pictures in smaller theatres?

Mr. Wolf: If you mean all pictures or some pictures—I think the question should certainly be defined a little bit.

Mr. Sawyer: He seemed to have no trouble answering this question before, Your Honor.

The Court: That has nothing to do with it. I overrule the objection.

The Witness: Mr. Sawyer, let me say this to you, that—

By Mr. Sawyer:

Q. Could you answer first and then make your explanation? It is more orderly, usual procedure.

A. I will do anything that you say, sir.

Q. It is what the judge says that I think what we generally do is try to answer the question first yes or no and then give your explanation, if you will.

A. Yes, sir.

Q. Now, do you want me to repeat it?

A. If you will, sir.

(5028)

Q. Did there come a time when the distributors indicated to you that they preferred to play their pictures in smaller theatres?

A. Yes. However, these are general statements. There are times when a distributor would say that he would like to play a smaller theatre; there are times when a distributor says he would like to play a big theatre. There are so very many different occasions when because of the type of picture that the distributor has that he can change his mind. These distributors are businessmen; they market all their pictures differently. They don't follow any pattern, and every one of these distributors are different people who think independently of one another. So what they may think of today because of another picture that they may have to distribute,. they may change their mind the following week.

(5029)

Q. Well, now, wasn't there a—well, if that is so, Mr. Minsky, can I ask you what you meant when you answered this question and gave this answer in your deposition:

> "Q. Wasn't there a period of time, more or less, when the trend towards smaller, more intimate theatres began?
>
> "A. When the smaller theatres started to play pictures and the distributor determined in his own mind that he wanted to play a picture in a small theater, we, of course, were at a tremendous disadvantage in the Mastbaum Theatre. Our expenses were high as compared to the expenses in the smaller theater. We naturally were second best."

Now, aren't you there speaking of a general trend, even allowing for individual differences of times?

A. Yes, Mr. Sawyer. I am speaking of a general trend with regard to an independent or an individual picture, so to speak, but, conversely, there were also times when because of a—the length of a picture, a distributor, for in-

stance, may have had a three-hour or three-and-a-half-hour picture, and he then reversed himself and went from a small theater to go to a large theater where he could get a number of performances in rather than to be limited by a small theater. So that these trends changed many times throughout the course of buying pictures.

(5030)

Q. Now, was the Stanley—strike that.

Was the Stanton Theatre known as an action house?

A. Yes. The Stanton Theatre was known as an action house.

Q. What is an "action house?"

A. A theater that plays the type of picture that would appeal to usually men, a Western or a murder story, a detective story. That I would call an "action house."

Q. And is that often double feature?

A. The Stanton Theatre played double features on occasion. On occasion they played single features.

Q. And was this period of their being an action house up to the time in which they were renovated, repaired and renovated?

A. I would say so, Mr. Sawyer.

Q. And was there a considerable amount of expense put into the renovation of the Stanton Theatre in 1955?

A. I understand that we spent quite a few thousand dollars.

Q. You did a good bit of work on it, did you not?

A. I understand we did, sir.

Q. And that took it then out of the category of an action house and into the category of a full-fledged first-run house, did it not?

A. It was always a full-fledged first-run house, Mr. Sawyer. Don't ever have the—the understanding that this wasn't a first-run house. This was a very good first-run theater at all times.

(5031)

Q. Well, it didn't compete for the same kind of product, though, did it, that you sought for your Mastbaum and Stanley Theatres?

A. On occasions there were pictures that played at the Stanton Theatre that could have played in the Mastbaum or vice versa.

Q. But generally not?

A. This was a matter of the way the distributor wanted to market his pictures.

Q. But generally the action pictures that played at the Stanton were not the type of pictures you sought for the Stanley or Mastbaum; isn't that so?

A. Generally speaking, sir.

Q. And the type of pictures that played at the Stanley and the Mastbaum up until the renovation of the Stanton were rarely, if ever, played in the Stanton; wasn't that generally true?

A. Generally true.

Q. Have you been in the Viking Theatre since it was remodeled and air-conditioned?

A. I had the occasion to be there on the opening night, Mr. Sawyer.

Q. And have you been there since then, too, on occasion?

A. No; I haven't, sir.

(5032)

Q. Is it a comfortable theater with nice appointments?

A. I think the Viking is a nice theater.

Q. And has a good view of the screen, does it?

A. I remember being there opening night that I was able to see the picture very well.

Q. Would you say that it was on a par with the Midtown?

Mr. Wolf: In what?

The Witness: In so far as what, sir?

Mr. Wolf: In what respect?

By Mr. Sawyer:

Q. Well, let me ask you this: In respect to location, would you say they were on a par, the Viking and the Midtown?

A. I would say this, Mr. Sawyer, that, yes, they are on a par in so far as accessibility to the—

Mr. Wolf: As what?

A. —motion picture public is concerned.

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(5033)

Q. How about the—

A. —but they are not on a par in so far as being close to the flow of drop-in trade—

Q. Location-wise.

A. —of the walking traffic.

Mr. Rome: Let him finish.

By Mr. Sawyer:

Q. Just location-wise?

Mr. Young: You didn't ask him about location-wise.

The Court: Let him proceed.

By Mr. Sawyer:

Q. Let me ask you, Mr. Minsky, location-wise would you say that the Viking and the Midtown were on a par?

A. I just answered your question, Mr. Sawyer. I would say that in so far as being accessible to the public in Philadelphia and its environs that they are on a par, but they are not on a par in so far as the flow of pedestrian traffic is concerned in a downtown area.

Q. How about the Viking and the Randolph? Would you say that location-wise they were on a par?

A. I would believe that the same thing would be true with

(5034)

regard to the Viking and the Randolph. I think there is more of a flow of traffic, pedestrian traffic, at the Randolph area. I would say they are on a par in so far as being accessible to the public.

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(5035)

Q. I will save time if I say: Didn't you so testify, Mr. Minsky, without any qualifications whatsoever in your deposition; do you recall?

A. I recall that I testified on it, Mr. Sawyer.

Q. Well, I will read to you, if I may, page 125:

"Q. From the standpoint of location, how do you think the Viking compared with the Randolph?

"A. Location-wise I believe they were on a par."

Now, I state to you—and your counsel can correct me—that you did not make any qualification whatsoever—

Mr. Wolf: He wasn't asked.

By Mr. Sawyer:

Q. —in that answer, did you?

Mr. Wolf: He wasn't asked anything further.

By Mr. Sawyer:

Q. "Q. From the standpoint of location, how do you think

(5036)

the Viking compared with the Randolph?

"A. Location-wise I believe they were on par."

Now, that was answered without qualification as to any aspect, was it not?

A. Yes, sir.

Q. And then were you asked this question:

"Q. And naturally the Viking and the Boyd were on a par location-wise; isn't that true?

"A. Yes."

You could—I didn't ask you that here, but you could hardly have answered otherwise, could you, with the Boyd being just a few doors from the Viking; is that correct?

A. We agree completely, Mr. Sawyer.

Q. And do you think the Boyd has a good location, your theater, the Boyd?

A. I think the Boyd Theatre is well located; however, I don't think that the Boyd Theatre is as well located maybe as it could be, but it is a good location.

Q. I guess no theater ever is.

Now, question:

"Q. Now, how about the Viking and the Midtown?

"A. On a par.

"Q. And the Viking and the Mastbaum?

"A. On a par.

(5037)

"Q. And the Stanton and the Goldman?"

Well, on a par. I am not asking you. They are two other theaters.

Now, what are minimum terms, Mr. Minsky? Are you familiar with the term "minimum terms?"

A. Here, again, we are getting into a generalization, and if we understand that it is on the basis of a generalization, I guess I can answer the question, Mr. Sawyer. At times a distributor in the distribution of his picture will fix in his own mind what he wants to receive as a minimum for his motion picture.

Q. And is that what your understanding is "minimum terms?"

A. Yes, sir.

Q. And were you ever informed as to what "minimum terms" were that the distributor wanted for his picture?

A. Well, in sitting down to negotiate with a distributor, it is like any other business: they are businessmen; I am a businessman. He will tell me what he wants for his motion picture.

Q. He would have to in order to negotiate with you, wouldn't he?

A. He would tell me what he wanted for his picture, sir.

Q. And the negotiation would be impossible, would it not, between two businessmen unless one of them said what he wanted for the product he was selling?

(5038)

Mr. Wolf: We will concede that.

Mr. Sawyer: Well, just—

Mr. Wolf: It is so obvious.

Mr. Sawyer: The witness smiled.

By Mr. Sawyer:

Q. Does that mean "Yes?"

A. Well, it is a normal thing, sir.

Q. Yes, sir.

A. —in doing business that you—

Q. Yes, sir; tha is what negotiation really amounts to, doesn't it, what it means?

A. I would say so, sir.

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(5039)

Q. Well, my first question was: Is that an offer by the Mastbaum Theatre for the motion picture WAR AND PEACE?

A. This is an offer from the Stanley Warner—

Q. From Stanley Warner.

A. —to the—to Paramount Pictures asking them to play

(5040)

the picture in either the Stanley or the Mastbaum Theatre.

Q. Well, I didn't—that feature of it I didn't, I agree with it, I didn't—I wasn't concentrating on that. Now, is therein an offer with respect to the Mastbaum Theatre?

A. Yes, sir. There is.

Q. Now, is the offer a 90 per cent offer over a house-nut figure?

A. It says here—do you want me to read it, sir?

Q. Yes, if you will.

A. It says, "We offer you the Mastbaum Theatre on the basis of 90 per cent of the net box office receipts over $8792 per week or the Stanley Theatre on the basis of 90 per cent of the net box office receipts over $7483 per week.

Q. Well, now, first of all, with respect to the Mastbaum, your figure there is $8792 a week; is that correct?

A. That is right, sir.

Q. And that figure, of course, is self-evident; it varies considerably from the $10,848 figure that you testified to and was on the other bid; is that right, sir?

A. That is right, sir.

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(5044)

Q. What is that document, Mr. Minsky?

A. This is a record that is kept in our office of the pictures from the film companies and the way they were split.

Q. And what is the heading? Don't read the names of any motion pictures. What is the heading on the first sheet that you have before you?

A. It says, "Paramount Split First Run Philadelphia."

Q. And now is there a heading at the left-hand side of that page? And, if so, what is it?

A. The heading here says, "Ours."

Q. Ours?

A. That is right, sir.

Q. And what does that mean, sir?

A. Well, actually, what this means is nothing more than when you make a split that you have to in some way identify which it would be on your side of the split and which would be on the opposition side of the split.

Q. What does "Ours" mean?

A. I just told you, sir. That would mean that this would be

(5045)

on our side of the split.

Q. Stanley Warner side?

A. That is right, sir.

Q. That is all I wanted; and what is the heading on the other side of the column? The other column is headed with what?

A. On the other side says, "Goldman," sir.

Q. And are there then down the column in the middle the names of various months of the year with the date, the yearly date next to them?

A. Yes, there are, sir.

Q. And are there then in the columns on either side under the words "Ours" and "Goldman," respectively, the names of motion pictures?

A. Yes, there are, sir.

* * *

(5087)

Q. Now, would you say, Mr. Minsky, that the gross a picture earns depends mainly on what the picture is?

A. No. I wouldn't say that, Mr. Sawyer. I would say that the gross of a motion picture depends upon a number of factors, depends upon the size of the theater, depends upon the location of the theater in so far as the access-

bility and the availability of the flow of pedestrian traffic. It also depends a lot upon the showmanship of the—of the people who are operating the theater.

Q. Do you recall, Mr. —

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(5088)

The Witness: I would say this, that in so far as a motion picture is concerned, in thinking in terms of what constitutes a good motion picture, that the—the story is most important of all.

By Mr. Sawyer:

Q. Now, Mr. Minsky, you were asked that question, were you not, on a previous occasion? Do you recall being asked that question once before?

A. If it is in the record, I guess I was, Mr. Sawyer.

Q. Do you recall it?

A. I think I do; yes.

Q. And do you recall that you then answered, without any such qualification, that the important thing was the play is the thing? Do you remember that?

A. Yes; I do, Mr. Sawyer. I would say that.

Q. Now, let me read to you that question and answer, if I may:

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Q. "Q. Was the important thing in relation to grossing the

(5089)

caliber of an individual picture, did the gross depend mainly on what the picture was?

"A. Well, I would say the play is the thing.

"Q. Meaning the picture?

"A. Yes."

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(5093)

Q. Now, could we also agree, Mr. Minsky, that subject to your counsel's agreement that in the case of the motion picture HELEN OF TROY which played the Mastbaum that late shows were paid for at a film rental less than the film rental specified in the contract?

(5094)

A. I wouldn't know that, sir.

Mr. Wolf: Would you wait just a minute?

Mr. Sawyer: HELEN OF TROY.

Mr. Wolf: We will admit that the price paid for late shows was $74 less than would have been paid during the—for plays during the normal theatrical hours.

Mr. Sawyer: And BAD SEED?

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(5095)

Mr. Wolf: In the case of BAD SEED the amount paid as film rental on late shows was $377 less than the amount that was called for by the contract on shows during ordinary theatrical hours.

• • •

By Mr. Sawyer:

Q. Isn't it true, Mr. Minsky, that your contract for BLOOD ALLEY called for the Stanley Theatre to show that motion picture three weeks?

A. I don't know, Mr. Sawyer. I would have to see the contract to know that.

Q. Well, would you agree, subject to check by your counsel, the contract called for three weeks and that you exhibited the film only two weeks?

(5095a)

A. If they so specified it, I would agree, Mr. Sawyer.

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(5098)

Q. Mr. Minsky, turning to these late shows once again, your testimony, as I understand it, is that the late shows in these instances that I have given you, you will agree, were not specified in the contract to be paid for at a lower rental?

Mr. Wolf: They weren't specified before in the contract at all.

Mr. Sawyer: Very well.

By Mr. Sawyer:

Q. There was no specification in the contract, however, that late shows were to be paid at a lower rental; is that correct?

A. There was no specification in the contract regarding late shows.

• • •

Q. Were there occasions when you did put in your contract a

(5099)

lower rental for late shows?

A. There may have been. I don't remember.

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(5100)

Q. Mr. Minsky, isn't it true that in the contract for the motion picture LEATHER SAINT that the contract itself provides that there will be payment of 5 per cent less for late shows?

A. I don't know. I would have to see the contract.

The Court: As I understand it, Mr. Minsky, you would have a rental in some of these pictures and nothing would

(5101)

be said at all about late shows.

The Witness: That is right, sir.

• • •

Q. Then you don't deny that there were such instances where late shows—strike that—where in the contract itself—

Mr. Wolf: If he does not know how can he deny it?

The Court: No, he says there may have been.

By Mr. Sawyer:

Q. Well, this would be such an example, would it not,

(5102)

Minsky, on the motion picture LEATHER SAINT?

A. Subject to having it checked by the original contract, Mr. Sawyer, I would say yes.

Q. And that is what that means?

A. Yes.

Q. The late shows will be paid for at 5 per cent less as per the contract?

A. That is right, sir.

Q. After you had discussions with respect to late shows was that ever formalized by an exchange of letters or a supplement to the contract?

A. Usually not, Mr. Sawyer.

Q. Do you have any instances where it was, Mr. Minsky?

A. No, I have no records, Mr. Sawyer.

• • •

Q. Is it your testimony, Mr. Minsky, that there were

(5103)

instances in which you decided to put on late shows and reached an agreement with the distributor that they would be paid for at less rental, that that was put in writing in any form?

A. There may have been, oh, yes, Mr. Sawyer.

Q. You say that there may have been, that means that you recollect that there were such instances?

A. Mr. Sawyer, may I clarify it in my own way, sir?

The Court: You may.

Mr. Sawyer: Oh, yes.

The Witness: I am trying to make it easy actually, because I was the film buyer.

Now, in the course of a day's work or in the course of a week's work there were an awful lot of forms that came in, and, as I explained, we operated three theaters downtown, or four theaters for a while there. We didn't know in advance—

By Mr. Sawyer:

Q. You operated more than that, didn't you? Excuse me.

A. Well, we operated the Aldine—

Mr. Wolf: The theaters downtown.

A. —the Boyd, the Mastbaum, the Stanley, and the Stanton. Five. Thank you for correcting me.

And we didn't know at the time which of the

(5104)

theaters we would play a late show in. We usually would only select one theater to play a late show, because there were just a certain number of people who would come late at night.

It actually started during the war years, when the people who had to work the swing shift would go to a movie to see a late show. And we would select one theater.

Now, because of the problem of buying pictures first run Philadelphia, which we are all very familiar with, because of the fact that we couldn't plan it that far in advance, we would sit down in a meeting a week in advance and determine at which theater we would show a late show.

Now, the picture was already contracted for.

Then we would select the theater that we would have a late show and I would call the branch manager on the telephone and make a deal with him, Mr. Sawyer.

Now, that deal could come in before the picture opened, during the run of the picture. Because that is the way—it worked out that way.

I have tried to clarify it as best I can.

By Mr. Sawyer:

Q. You tell me, please, Mr. Minsky, how that clarifies my question as to whether or not you put those deals in writing or didn't put them in writing.

A. Sometimes they may have been in writing, depending upon

(5105)

the change; sometimes it may have been an oral deal. An oral deal is the same as a written deal.

* * *

(5107)

CROSS-EXAMINATION

By Mr. Nizer:

Q. Because you have been asked about late shows, Mr. Minsky, and counsel asked you at great length about a picture of my client, United Artists, the picture was GENTLEMEN MARRY BRUNETTES, and there were two weeks on that, and I show you the cutoff card that he

asked you, and I ask you during the first week how much money was involved in the difference for the price for the late show as against the price of the regular showing of the picture; how much difference was it that entire week? I want to know how many dollars are involved in this.

A. Well, the late show, Mr. Nizer, grossed $808.

(5108)

Q. No, I want the difference in the film rental.

A. The difference in the film rental is $80.80.

Q. Eighty dollars for the entire week?

A. That is right, Mr. Nizer.

Q. Now, it played a second week. I want to know how much money was involved in this difference that you have been asked about. How much was it for the second week?

A. $23.05.

Q. Three dollars?

A. Yes, sir.

Mr. Nizer: That is all, sir.

By Mr. Wolf:

Q. I will ask you another question about the late shows: What was the relation of the attendance at late shows compared with the attendance at the shows given during the normal business hours of the theater in general?

A. Well, it was naturally a very reduced attendance, because the people who would attend at night were very, very few compared to the people who attended during the regular day.

Q. Didn't that enter into the question of what film rental should be paid for those late shows?

A. All these entered into it, Mr. Wolf.

* * *

(5113)

DIRECT EXAMINATION (Continued)

By Mr. Sawyer:

Q. Mr. Minsky, we were proceeding with the list of pictures in accordance with the list that you had and the

list that I had here, of motion pictures on which Stanley Warner may have made a bid or offer or on which the Viking made a bid or offer, and I first turn to the motion pictures of Loew's and ask you if you will accept, in view of the agreement of counsel, that the Viking made a bid or an offer on 19 Loew's pictures and acquired 10, and that Stanley Warner made a bid or an offer on 11.

Suppose I just use simple language and use the word "got" here. Is there any objection? It is a simple word. And I will use ST-W for Stanley Warner. Over here we will have a column of "Others." If I may state, that means non-defendants.

Stanley Warner bid on 11 of those and got 2 and 4 went to "Others."

In the case of United Artists the Viking sought

(5114)

to license by bid or offer 17 and got 11; that the Stanley Warner Theatres sought 4 and acquired 2 and one went to "Others."

In the case of Warner the Viking bid on 10, got one; that the Stanley Warner bid on 5 and got 5.

In the case of Columbia the Viking bid or offered on 4, got one; Stanley Warner sought 2, got one.

Mr. Wolf: Excuse me, Mr. Sawyer, when you say "Others," you do not include Goldman?

Mr. Sawyer: No, no, I do not.

Mr. Wolf: As you read it I suspected it did include Goldman.

Mr. Sawyer: No, I would like to make it clear that that does not. Is that correct, Mr. Steinberg?

Mr. Steinberg: No, it is non-defendant exhibitors.

By Mr. Sawyer:

Q. Now, in the case of Paramount the Viking sought 13 and got 2; Stanley Warner sought 6 and got 2.

In the case of Universal Viking bid on 6, got 4; Stanley Warner bid on 2 and got 2.

In the case of RKO the Viking bid on 2, got none; Stanley Warner bid on one and got one.

(5115)

In the case of Fox, Viking sought 16, got 8; Stanley Warner sought one, got one.

Now, in view of the agreement between counsel, would you accept that, Mr. Minsky, subject to any corrections which counsel might later wish to make?

A. I don't know if the answer is correct or not, depending upon what counsel will stipulate, Mr. Sawyer.

Mr. Nizer: Counsel would like to indicate that I have here letters, they are not communications with your client, in the case of Loew's which shows, and here is the document, Stanley Warner will not make an offer but they are willing to negot . These are in addition to what you have. I have some letters. Would you like to see those?

Mr. Sawyer: We have those but—

Mr. Nizer: There are some more.

Mr. Sawyer: The statement that one is willing to negotiate, we are not asserting is a bid or an offer.

Mr. Nizer: I am not arguing it, I simply say that they are willing to negotiate on other pictures that are here.

Mr. Sawyer: Of course, that would throw out the 87 quite considerably, Your Honor, because the issue here is whether or not—

Mr. Nizer: No; within the 87.

(5116)

Mr. Sawyer: But if added to the Viking 87 the ones on which there was a letter from the Viking say-

ing, "We are willing to negotiate," of course, it would up the total considerably. The issue here is whether, aside from any declaration of future intention, there was an offer or a bid.

Mr. Nizer: No. You have included those on the Viking and I say there are others from Stanley Warner.

Mr. Sawyer: No, we have not.

Mr. Nizer: We will talk to you later about it. I don't want to hold you up. Excuse me.

Mr. Sawyer: (At blackboard) So that here we have 87 and a total of 37 acquired, and here we have 32, acquired 17.

Mr. Wolf: 16 not 17.

Mr. Sawyer: I am sorry (correction made by Mr. Sawyer on blackboard.)

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(5119)

CROSS-EXAMINATION (Continued)

By Mr. Wolf:

Q. I want to ask you one question before I go back to the blackboard. With respect to the Twentieth Century-Fox product, did you have any agreement with anybody respecting whether you would or would not bid for Twentieth Century-Fox pictures?

A. I had no agreement with anybody.

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(5120)

Q. You did answer the question?

A. Yes, I did, sir.

Q. What was your answer?

A. I had no agreement whatsoever.

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(5129)

Q. Mr. Minsky, on the split record that was presented to you, one column is headed "Ours" and one column is headed "Goldman." "Ours" means what?

A. Well, "Ours" means in this instance that in dividing up the two splits, for a better word to use we used the word "Ours," and we used the word "Goldman."

Q. "Ours" means "Stanley"; correct?

A. "Ours" means "Stanley Warner," but at no time did it mean that those pictures belonged to us or did it mean that the distributor had to sell us those pictures—

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(5130)

A. I was saying that at no time did it mean that these pictures belonged to us, that these pictures, if we wanted to buy them, we had to compete with every other theater in first run Philadelphia for them.

• • •

Q. Now, I want to take up the pictures which are on the Paramount split as you have it before you. I see on "Ours," STRATEGIC AIR COMMAND. Did we play the picture?

A. Yes, we did.

Q. Well, I will put down a mark "1"—that is one picture on our split that we played.

On the Warner Brothers split I see under "Ours" four pictures. Did we play them all?

A. Yes, we did, Mr. Wolf.

Q. That is five—1, 2, 3, 4, 5. That is five I will mark that way.

(5131)

I see on the Goldman split a picture BABY DOLL. Did Goldman play that picture?

A. No. He not did play that picture.

Q. Where was the picture played?

• • •

A. It played the Viking Theatre.

Q. Put one down for Viking.

Turn to the next picture, Metro. I see that on our split—and "our" is who? Stanley Warner?

A. Stanley Warner.

Q. BRIGADOON. Did we play the picture?

A. No. We did not.

Q. Who played it?

A. The Viking Theatre.

(5132)

Q. I see on that split ATHENA. Did we play it?

A. No. We did not.

Q. I see on our split HIT THE DECK. Did we play that?

A. No. We did not.

Q. Who played that?

A. The Viking.

Q. I see on our split TRIAL. Did we play that?

A. No. We did not.

• • •

Mr. Wolf: Well, I will put this under the column "Others," then.

(5133)

By Mr. Wolf:

Q. I think I forgot to ask at what theatre ATHENA played.

A. It played the Viking, Mr. Wolf.

Q. I marked it up. I can't mark it up twice.

I also see on that list under "Ours," OPPOSITE SEX. Where did that play?

A. It played the Arcadia Theatre.

Q. I also see under the heading "Ours" TEA-HOUSE OF THE AUGUST MOON. Did that play at our house?

A. No. It did not.

Q. Where did that play?

A. Played the Arcadia.

Q. I see under the Goldman split STUDENT PRINCE. Did that play any of the Goldman Theatres?

A. No. It did not.

Q. Where did that play?

A. It played the Viking.

Q. I also see on the Goldman split LAST TIME I SAW PARIS. Did that play one of the Goldman Theatres?

A. No. It did not.

Q. Where did that play?

A. It played the Viking.

Q. 1, 2, 3, 4, 5. I see on the Goldman split GLASS SLIPPER. Did that play any of the Goldman Theatres?

(5134)

A. No. It did not.

Q. Where did that play?

A. Played the Viking.

Q. I see on the Goldman split IT'S ALWAYS FAIR WEATHER. Did that play any of the Goldman Theatres?

A. No, it did not.

Q. Where did that play?

A. Played the Arcadia.

Q. Now, these are all pictures on that split record that you showed, that you identified before?

A. Yes, Mr. Wolf.

Q. Well, I see on the United Artists record on the column—in the column which is headed "Ours," NOT AS A STRANGER. Is that the great picture that we have heard so much conversation about here?

Mr. Sawyer: Objected to. The witness hasn't been here, I assume.

The Court: Sustained.

By Mr. Wolf:

Q. That I see is on our Stanley split. Did it play the Stanley, any of the Stanley houses?

A. No. It did not.

Q. Where did that play?

A. That played the Viking.

(5135)

Q. I see under that on our split DESERT SANDS. Did that play any of the Stanley Theatres?

A. No. It did not.

Q. Where did that play?

A. It played the Viking, Mr. Wolf.

Q. I see on our column COMANCHE. Did COMANCHE play any of our houses?

A. No. It played the Viking, Mr. Wolf.

Q. I see on that list KISS BEFORE DYING on our column. Did that play any of the Stanley Theatres?

A. No. It played the Viking.

Q. Finally I see on our side of the split RUN FOR THE SUN. Did that play any of the Stanley houses?

A. No. It played the Viking.

Q. Now, going to the Goldman column, I see on the Goldman column a picture we have heard about, BIG KNIFE. Did that play any of the Goldman Theatres?

A. No, it played the Viking.

Q. I see in the Goldman column TRAPEZE. Did that play any of the Goldman Theatres?

A. No. It played the Trans-Lux.

Q. 5. I see in the Goldman column BANDIDO. Did that play any of the Goldman Theatres?

A. No. It played the Viking.

(5136)

Q. And then I see below that ATTACK in the Goldman column. Did that play any of the Goldman Theatres?

A. No. It played the Viking.

Q. There are only two more.

Now I will go to those which played in our houses that were on our column, in our column. We have already noticed STRATEGIC AIR COMMAND, BLOOD ALLEY, HELEN OF TROY, BAD SEED, and GIANT—five.

In the Metro split in our column was THESE WILDER YEARS; correct?

A. Right, Mr. Wolf.

Q. And JULIE; correct?

A. Right.

Q. Now, on the RKO split, was DEATH OF A SCOUNDREL?

A. Correct.

Q. On United Artists GENTLEMEN MARRY BRUNETTES?

A. Correct.

Q. And on the Universal split FOX FIRE and WRITTEN ON THE WIND; so that the score is that the Viking had 15—I think it was accurately 17—and we had 11, and others had five; and these are in the case of the Viking and in the case of others different from the pictures as they appear on the split list; is that correct?

A. That is correct.

* * *

(5137)

Q. I missed HELL'S ISLAND, which was a Paramount picture on the Goldman split, but which played the Mastbaum; is that correct?

A. That is correct.

Mr. Wolf: So I will make that 12. I wish I could write better. I will have to go back to school.

By Mr. Wolf:

Q. That makes 15 at the Viking, 12 at our houses, and five at other houses; is that correct?

(Mr. Poul and Mr. Wolf confer.)

Mr. Wolf: Oh, I thought there were 17. I was wrong. I had forgotten on the Paramount split—

Mr. Nizer: That is right.

Mr. Wolf: LUCY GALLANT—

Mr. Nizer: That is right.

Mr. Wolf: —on the Goldman split of Paramount which played the—

Mr. Nizer: Viking.

(5133)

Mr. Wolf:—Viking.

The Witness: Played the Viking Theatre.

Mr. Wolf: Yes. I should have added that. And one more, Mr. Poul?

Mr. Poul: THREE VIOLENT PEOPLE.

By Mr. Wolf:

Q. THREE VIOLENT PEOPLE, which is also on the Goldman split, which also played the Viking?

A. Right.

Mr. Wolf: I don't want to be unfair to the Viking. They got 17.

• • •

By Mr. Young:

Q. Do you recall, Mr. Minsky, that Mr. Sawyer rather paraphrased your deposition testimony with respect to conversations with Mr. Seidenberg and asked you if you so testified and you said, "If I did, I did"?

A. Yes, sir.

Q. As a matter of fact, as a film buyer it was your job to get as much information about all the pictures that played in

(5139)

Philadelphia as possible; isn't that right?

A. That is right, Mr. Young.

Q. From Seidenberg or from any other operator, including Wren or Sley; isn't that a fact?

A. That is correct, sir.

Q. And in these discussions you wanted to know how the picture is doing, how is it grossing, is it holding up at the box office, because you had sub-run theaters that you were interested in negotiating for; isn't that correct?

A. That is right, sir.

Q. Now, did you ever do anything, Mr. Minsky, as a representative of Stanley Warner, to prevent the Viking Theatre, Sley and Wren, from bidding or making any offers on Twentieth Century-Fox pictures that played the Fox Theatre or anywhere else?

A. Never, Mr. Young.

Q. Now, is not your Stanley Theatre, in your opinion, the best located of your—your Stanton Theatre the best located of the three Stanley Warner Theatres?

A. That is my opinion, Mr. Young.

Q. And who is right next door to it? The Fox Theatre, isn't it?

A. The Fox Theatre, sir.

Q. Right; and, in your opinion, there is more pedestrian traffic on Market between 16th and 17th than on Chestnut

(5140)

between 18th and 19th at almost any hour of the day or night; isn't that correct?

A. That would be my opinion, Mr. Young.

Q. Now, this record you kept, P-1, there were no Twentieth Century-Fox pictures on the split, were there?

A. No, sir.

Mr. Young: That is all.

Mr. Rome: With Your Honor's permission.

By Mr. Rome:

Q. You consider, Mr. Minsky, that the flow of pedestrian traffic is important for a theater?

A. I would consider it very important, sir.

Q. Why is that?

A. Well, maybe I can best illustrate it by saying that the reason that theaters have advertising pieces in front of their lobbies, in front of their theaters, is to attract people who are downtown and who are walking by that particular theater. If people always knew where they wanted to go, they wouldn't have to have advertising in front of a theater.

This is a—a normal fact in—in business, and I would imagine that anybody who is going to be passing by a theater would naturally be more inclined to go into the theater that is closest to them.

The heavy flow of traffic in that area is

(5141)

certainly a very vital part of evaluation.

Q. During the period in this suit from 1954 to 1956, had you occasion personally ever to visit the locations of the several theaters in downtown first run Philadelphia?

A. Oh, yes, Mr. Rome.

Q. And what was your observation as to the nature of the pedestrian traffic and its flow in connection with the location of the various theaters?

A. Well, it would be my opinion that the heavy flow of pedestrian traffic would be in the area of the 15th Street, 16th Street, Market, Chestnut Street and, of course, to a very great degree also during the day there would be a tremendous flow of traffic down on 11th Street and Chestnut.

Q. Now, would you agree, Mr. Minsky, that there is an importance in so far as pedestrian traffic is concerned in

connection with the amount of matinee or daytime business that results to a particular theater?

A. Very much so, Mr. Rome.

Q. And would you agree that there is a difference between the flow of pedestrian traffic during the day as contrasted with the nighttime?

A. Oh, yes, Mr. Rome.

Q. And had you occasion during the period that we have been talking about to notice the flow of pedestrian traffic at the

(5142)

Viking Theatre during nighttime hours?

A. I have been in that area at night, Mr. Rome.

Q. And what was your observation at that time?

A. Well, it would be my opinion that there is less of a flow of pedestrian traffic in that area than there is in the other area I just described to you.

* * *

(5143)

RE-DIRECT EXAMINATION

* * *

(5146)

Q. Would you answer that, whether or not you assert that the pedestrian count at the Mastbaum was anything like that at the Viking at 19th and Chestnut Streets?

A. Well, let me say this to you, if I may answer you, sir.

Q. All right.

A. I don't know by percentagewise or by numbers exactly what it would be.

Q. You never made a survey, did you, sir?

A. Oh, no. In fact, I think Mr. Rome asked me if I had ever walked around.

Q. All right.

A. Let me say this, that maybe the traffic count pedestrianwise would be less at the Mastbaum Theatre than it would be

(5147)

at 19th Street.

Q. Do you have any doubt whatever, Mr. Minsky, that it was far less? Do you have any doubt in your mind?

A. Mr. Sawyer, could I tell you this? That I have been away from Philadelphia for some time, as you know.

Q. Haven't you—

A. And during that time—

Q. When you were film buyer during this time you lived in Philadelphia, you worked in Philadelphia—you worked in Philadelphia, I don't care where you lived—you bought film for these three theatres, you were constantly involved, so you must have known the downtown section well. Now, do you have the slightest doubt that on the north side of Market Street out beyond 20th Street, where the Mastbaum was located, that the pedestrian count would be a mere fraction of what it would be in front of the Viking Theatre? Do you honestly have any doubt? You will concede that, won't you?

A. No, I won't concede mere fractions, but let me say this to you, that the pedestrian count could be less at the Mastbaum Theatre than it is at 19th Street. Is that what you are trying—

Q. It certainly could be, couldn't it?

A. Yes, it certainly could be, Mr. Sawyer.

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(5152)

WILLIAM GOLDMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Goldman, what relationship do you have, if any, to the defendant William Goldman Theatres Corporation?

A. I am the President.

Q. Do you have any other relationship to that corporation, other than being the President?

A. That is all.

Q. Are you not the principal stockholder?

A. Yes, sir.

Q. Now, what theatres does that corporation operate?

Mr. Rome: I object to anything other than first-run theatres in downtown Philadelphia.

I take it that is the limitation of the question, sir?

Mr. Sawyer: I press the question, Your Honor, as to what theatres William Goldman Theatres Corporation, a defendant in this case, operates?

The Court: Why—

Mr. Sawyer: I will modify it to this extent—

(5153)

The Court:—is it relevant?

Mr. Sawyer:—the Philadelphia exchange area.

Mr. Rome: I object, sir.

The Court: Why is it relevant if we are only dealing with first-run pictures?

Mr. Sawyer: Your Honor, it is the exact same thing as we had yesterday, it is to show buying power. I offer it for that purpose.

Mr. Rome: I ask that we go to side bar if Mr. Sawyer is going to make any comment about it.

Mr. Sawyer: That is the only comment I have. I offer it for that purpose.

The Court: Well, I think I have considered that, and I know that I have a particular point in my charge.

I will overrule the objection.

Mr. Sawyer: Will you proceed, Mr. Goldman.

The Witness: The Randolph Theatre.
Do you want by location or just the name?

Mr. Sawyer: Well, I think just the name.

The Witness: The Randolph, the Midtown, the Goldman Theatre, the News Theatre, the Bandbox, Germantown.
Are you talking about the City of Philadelphia?

Mr. Sawyer: Philadelphia exchange area.

The Witness: Well, the exchange area would go

(5154)

out of Philadelphia.

Mr. Sawyer: Yes.

The Witness: Bryn Mawr Theatre in Bryn Mawr. The Esquire Theatre; Pottstown; York; Reading; Hanover.

By Mr. Sawyer:

Q. May I suggest, are there not two more that slipped your mind?

A. Well—

Q. You have given me 11; isn't it 13 all together?

A. 12.

* * *

Q. Now, you mentioned the Randolph Theatre, it has been mentioned a number of times, was that theatre a theatre before you acquired it?

A. Yes, sir.

(5155)

Q. What was the name of it?

A. Keiths.

Q. And had Keiths Theatre been on second-run?

A. Yes.

Q. How long had it been—

A. Well, now, second-run for a period of time, but prior to that it was a first-run theatre.

* * *

(5156)

Q. Now, how long had the theatre been closed when it reopened under your auspices as the Randolph?

A. Well, the theatre was operating continuously until it had undergone the remodeling program. I would say better than six months during its rebuilding.

Q. Well, it was closed for a year or so before that, was it not?

A. No, sir.

Q. Was it running as a theatre when you acquired it?

(5156a)

A. When I acquired it?

Q. Yes.

A. Oh, I am sorry, I thought you meant at the time I remodeled it how long I had it closed.

(5157)

Q. Well, I am asking for how long a period it was closed both because of remodeling and—

A. I don't remember.

Q. It was closed, however, in dark and not showing motion pictures, when you acquired it; is that correct?

A. I don't think it was, Mr. Sawyer.

Q. You mean you don't think it was showing motion pictures?

A. Yes it was showing motion pictures. It was never closed.

Q. And how about the Midtown Theatre, was that—what was the name of that before you acquired it?

A. The Karlton.

Q. And was that theatre on second-run at the time you acquired it?

A. Well, it had been on first and second-run.

Q. But at the time you acquired it it was on second-run?

A. Yes, sir.

Q. And had both those theatres been off first-run for a couple of years before your acquisition of them?

A. Well, I wouldn't know the period of time. I would say there was a time when it did run second-run pictures.

Q. Well, it was substantially, was it not, it was at least two years in both cases?

A. I wouldn't venture to say it was two years. I would say

(5158)

there was a time when—

Q. And both of those motion picture houses were then playing motion pictures second-run after the Aldine, were they not?

A. Well, I would have no way of making any assessment as to how the pictures flow to those. I would say no. Because of the close proximity, I would say the picture that played the Aldine would go out to a neighborhood theatre. I could be entirely mistaken.

Q. If I told you, Mr. Goldman, that there were motion pictures that played the Aldine and then played the Karlton and the Keith, later to become the Randolph and Midtown, on second-run—

A. You would be perfectly right.

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(5159)

Q. Now, I ask you, Mr. Goldman, and I repeat the question, how the split was initiated, by whom and with whom. You understand that question?

A. Yes, sir, I do. The split was originally initiated by me with MGM, Loew's as they are known at this time, and I went to see Mr. Rogers and I told him—

Q. Who is Mr. Rogers?

A. Mr. Rogers was the General Manager of Loew's or Metro-Goldman-Mayer at that time, and I had complained to him that I thought that I ought to have a division of the pictures, that Warners had them all; there were no other theatres operating here but the Warner Theatres and the Fox and the Viking Theatre wasn't in existence at the time so it was just a matter of having him understand the inequity of it as I thought existed.

(5160)

Q. What was the inequity, Mr. Goldman?

A. Well, I thought that I should have the same opportunity as anybody else, such as we are presently doing, anybody who wants a picture today. I believe in that philosophy and I extend that to exhibitors today. I don't want to get away from that at all.

Q. Excuse me. But wasn't the inequity lying in the fact that you told Mr. Rogers that you had to bid for them?

A. Yes, I was bidding for them. That is true.

Q. So that what you wanted to put to Mr. Rogers, was it not, to him to accept the situation where you wouldn't have to bid against anyone?

A. That is right.

Q. And did you feel that to have to bid for every picture to obtain it was a hardship to you economically?

A. I still do today.

Q. Why do you think, why did you feel that bidding was a hardship to you economically?

A. Well, Mr. Sawyer, if I was able to look at a motion picture and then predict what it would do, I would make my residence in California and I would tell the producer what he ought to make. I have no way of knowing,

bidding on pictures—the astronomical figures I heard Mr. Sley bid $107,000 up on a picture and only grossed the film rental of

(5161)

$46,000, there is just the example of what I want to avoid. That is the pitfall which I think is just wrong.

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Q. You said, however, that isn't that a pitfall, Mr. Goldman, that you wished to avoid. Did I hear you right when you said that just a second ago?

A. I just don't know how you said it—how I said it. You are repeating it.

Q. Did you not say that was a pitfall that you wished to avoid?

A. I am opposed to bidding, I don't like it, and it is a matter of semantics how you want to interpret pitfall. It is a thing that I just say to you very frankly, I don't like bidding. I used the word "pitfall." It is just a matter of where you are now getting into a matter of semantics and your interpretation and mine I think is at great variance.

Q. And do you believe it to be unsound economically from the

(5162)

exhibitor's standpoint?

A. I think so, yes.

Q. And isn't that because when you are bidding for pictures you end up paying more film rental?

A. Oh, yes. The answer is THE MAN IN THE GRAY FLANNEL SUIT.

Q. Aside from guarantees.

A. Sir?

Q. Aside from guarantees.

A. Yes, I think so.

Q. You still end up paying more for film rental, do you not, in bid situations?

A. Yes.

Q. So that the reason it is because you can't predict what the picture will do, isn't that the main economic reason that you object to bidding, Mr. Goldman?

A. The main reason?

Q. That isn't the main reason, the fact that you can't predict what the picture will do?

A. Well, that is primarily one of the reasons.

Q. Well, that would be true, wouldn't it, when you sign a license agreement, you would still be in that position then, wouldn't you?

A. Yes.

Q. And the license agreement, when you finally have acquired

(5163)

the picture, the license agreement binds you to certain terms, does it not?

A. That's right.

Q. And at the time you sign a license agreement you don't have a better idea what the picture is going to do; it is still a matter of prediction then, isn't it?

A. That is the reason I have maintained for a long time that I would rather negotiate for a picture than bid on a picture.

Q. But after you negotiate for the picture do you not sign a license agreement with the distributor?

A. Yes, sir.

Q. After negotiation?

A. Yes, sir.

Q. And at the time that you sign the license agreement the picture has not opened yet, has it, at your theatre?

A. That's right.

Q. So that from the standpoint of predicting what the picture will do, you are in no better position when you

sign the license agreement than you are when you are bidding, are you?

A. That's right. I think you are much better off in many respects.

Q. Not as to the prediction of the picture?

(5164)

A. No, sir.

Q. So that then can we agree that the objection that you have to bidding is that whether or not the guarantee is involved, you end up paying more film rental by and large?

A. I have seen guarantees work out favorably to the exhibitors as well.

Q. Let's accept the situation where, out of the situation in my question.

A. It has happened many times, yes. I wouldn't say that is just unilaterally so, that's not a fact.

Q. Well, whether or not there is a guarantee involved, is it not true, of your experience, that when you bid for pictures as opposed to negotiating for them, you end up paying more film rental?

A. Well, I just gave you the answer a moment ago.

Q. What is the answer? Is that true, or—

A. Repeat it.

Q. Is that correct, sir?

A. Not necessarily true because sometimes the pictures you bid for work out for you on a percentage that is equitable.

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(5165)

The Court: I think I agree with what you say, Mr. Ward, that I have ruled that the split is not illegal and is not improper or wrongful.

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(5166)

By Mr. Sawyer:

Q. So that you have told us, have you, that you worked out this split with Mr. Rogers of Loew's?

A. Yes, sir.

Q. And who agreed to it on behalf of Stanley Warner?

A. I beg your pardon?

Q. Who was it who agreed to it on behalf of Stanley Warner?

A. I don't know as anybody agreed on behalf of Stanley Warner.

Q. Was that done by Loew's without the consent of Stanley Warner?

A. Yes, sir, independently.

Q. And was there any objection, do you know, from Stanley Warner?

A. I have a vague recollection that there was, yes, sir.

(5167)

Q. And on whose part is that objection made?

A. Well, I don't recall but Warners never said anything to me personally. When I say I heard it, I wouldn't know where it came from or who, but I know that MGM worked, did it independently at my request, after a great deal of consideration, and provided this: That it was a picture to picture, and it was almost prophetic, which Mr. Rogers said in his agreement that until a competition appeared in the picture, we must not regard the picture on our split as our proprietary interest. We have no claim to that picture. And if you refer to that agreement you will see that that was definitely part of the arrangement.

Q. Was the agreement in writing?

A. Yes, sir.

Mr. Nizer: That is the letter.

By Mr. Sawyer:

Q. This is in connection with the Loew's split?

A. That's right.

Q. Now, after you made this arrangement with Metro, either you or your staff then had to deal, as far as the split goes, with representatives of Stanley Warner, did you not, to make it?

A. That's right.

Q. And did your staff get together with representatives of

(5168)

Stanley Warner or did you do it personally and divide up the product?

A. I don't think that I did personally, no, sir.

Q. So that whatever Stanley Warner's reaction to it was at the outset, when it became fait accompli and it was running, you and Stanley Warner cooperated to divide up the product in accordance with the split?

A. Well, when you say cooperated, I just don't know what you mean by cooperated. There were splits and there was a division of pictures for, whether there were two, three, four or five, and then they would alternate, and we had the first opportunity on a split, and then alternatively it would be the reverse.

Q. And that was done by your representatives and by representatives of Stanley Warner?

A. Well, this is the way the ground rules were laid down really by MGM.

Q. But in order to accomplish it as a physical matter, Mr. Goldman, didn't your representatives and Stanley Warner representatives carry that out?

A. Well, yes. But I say it initiated itself with MGM. Warner didn't lay down the ground rules how it could be done.

Q. Stanley Warner I mean, not Warner Brothers.

A. Stanley Warner.

(5169)

Q. Now, without taking each distributor, by the summer of 1953 let me ask you whether or not the following distributors were splitting their product, you and Stanley Warner: Universal—I will take them one at a time. Universal; is that right?

A. Yes, sir.

Q. United Artists?

A. Yes, sir.

Q. Columbia?

A. Yes, sir.

Q. Of course, already Loew's?

A. Yes, sir.

Q. RKO?

A. Yes, sir.

Q. And at that time—

A. Let me just interpose this. You are talking about splitting pictures. There were some companies that didn't split their pictures. I mean there was no uniformity with respect to the film companies. I know Columbia didn't split their pictures, in other words, give us the opportunity as MGM did. It varied in many respects. And that was true of several other companies I don't recall.

Q. When you say Columbia didn't split their pictures, I don't know as I understand it.

A. They permitted us to have access to play their pictures

(5170)

but Columbia did not let us split their pictures.

Q. What do you mean they didn't let you? You and Stanley Warner agreed that for the product of Columbia—

A. No, Columbia had a different notion about it. Their idea of marketing—

Q. Let me finish.

Did you not at that time have an agreement with Stanley Warner, irrespective of what Columbia said, that

you and Stanley Warner would not compete for Columbia's product; is that correct?

A. Well, I think you are asking the second question. I would like to answer the first.

Q. Well, you answer that one if you will and then we will go ahead to the next question. But is that the fact with respect to the—

A. State it again. I am confused. I have got the first question in my mind.

Q. Did you not have an agreement by the summer of 1953 with Stanley Warner that you and Stanley Warner would not compete with each other for the product of Columbia Pictures?

A. No, sir, that is not true.

Q. Did you have a split on Columbia Pictures?

A. No, sir.

Q. Were you competing with Stanley Warner for those?

(5171)

A. No, sir.

Q. Well, did you have an agreement not to compete on the product of Columbia?

A. I had no agreement with them at any time, sir.

Q. How does it happen that you and Stanley Warner were not competing for the product of Columbia if you had no agreement not to do it?

A. Well, sir, I tried to tell you that in contrast the way Metro permitted us to split their pictures Columbia would never permit us to do it ourselves. Physically they did it.

Q. I am sorry. You mean it was done by Columbia?

A. Yes, sir.

(5172)

Q. We did have a misunderstanding. Now, once—

A. That is what I tried to explain to you before.

Q. Now, once done by Columbia, then was it agreed that you would not seek the pictures that Columbia assigned to the Stanley Warner split and they would not seek the pictures assigned to—

A. Well, I didn't bid against them.

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(5179)

Q. Now, was there a meeting in the summer of 1953 at the offices of Paramount with respect to how the product of Warner Brothers and Paramount should be handled—

(5180)

strike that—how the product of Paramount should be handled?

A. Yes, sir.

Q. And who was present at that meeting?

A. Mr. Schwalberg, the general manager; Mr. Minsky.

Q. Mr. Schwalberg is the general manager of what?

A. Paramount.

Q. Was at that time?

A. That is right, sir.

Q. Yes, sir; he was president, wasn't he?

A. I beg your pardon?

Q. Wasn't he president?

A. He may have been.

Q. Yes, sir.

A. I think so. Howard Minsky was the Paramount—

Q. And who was Howard Minsky, sir?

A. He is one of the executives in the New York office—no; I am—I don't know whether he was in Philadelphia at the time. He may have been in Philadelphia. He is now in New York, is one of their top executives.

Q. And when you say—

Mr. Wolf: It was not the Mr. Minsky who was on the stand.

The Witness: This is his brother.

Mr. Sawyer: Yes.

(5181)

By Mr. Sawyer:

Q. And when you say "their top executive," would you identify which company you speak of.

A. Paramount.

Q. Paramount. All right. Schwalberg and Mr. Minsky of Paramount; is that right?

A. That is right.

Q. Now, was there anyone else there?

A. Yes, sir; Mr. Austin Kehoe, their general counsel.

Q. Paramount's general counsel; and who else, sir?

A. Myself, of course.

Q. Yes.

A. Harry Kalmine.

Q. Now, I don't mean to trick you. Are you sure Mr. Kalmine was there then or was it—

A. Then? Well, I just vaguely recall; he may have been there, but I know Mr. Fabian—

Q. Now, Mr. Fabian was there, was he not? And who is Mr. Fabian?

A. Mr. Fabian is president of the Stanley Warner Company.

Q. President of Stanley Warner?

A. Yes, sir.

Q. And so that at that meeting you were there representing the Goldman Theatres, Incorporated?

(5182)

A. Yes, sir.

Q. And Mr. Fabian was there as president of the Stanley Warner Theatres?

A. That is right, sir.

Q. And Paramount was represented by Mr. Schwalberg, its president; Mr. Minsky, one of its officials—

A. That is right.

Q. —in the film buying field, was he? Excuse me. Film selling field, Mr. Minsky?

A. Yes, sir.

Q. Whatever his particular—and their general counsel Austin Kehoe—

A. That is right.

Q. —is that correct? Now, first of all, before asking you what it was that was agreed to, let me ask you this: Was there an agreement reached at that meeting with respect to how Paramount product would be handled, licensing, bidding, and in first run Philadelphia?

A. Well, I would say that we had agreed—I don't know it was finalized—but in substance I think we did come to a meeting of the minds.

Q. You reached an agreement at that meeting?

A. I would think so; yes, sir.

Q. Now, was that agreement in writing?

(5183)

A. In writing?

Q. Yes.

A. I don't think so. No, sir.

Q. Well, will you speak up a little bit. I can't hear you.

A. No, sir.

Q. It was not?

A. No, sir.

Q. Did you say first of all you—did I hear you say, "I don't know?"

A. No. I did not say that.

Q. Didn't you just say that?

A. I said my recollection was there was no agreement at all.

Q. Did you not just say very quietly at that moment—

A. Very quietly?

Q. First of all, didn't you say, "I didn't—I don't know," and then—

A. No.

Q. What?

A. I am telling you now.

Q. All right.

A. I don't think there was any agreement in writing.

Q. Now, are you sure whether or not there was or is this just a recollection?

A. No. It is not a recollection. I am positive there was no

(5184)

agreement, because I recall now just who was there, what was said, and subsequently there was the picture made available to me after local office said that they were going to arrange a split.

Q. And was there ever a memorandum made of what was agreed to at that time?

Mr. Ward: Objected to.

The Witness: No, sir.

By Mr. Sawyer:

Q. Never?

Mr. Ward: Just a second. I have an objection to that question.

The Court: He has said he knows of none. I don't know how he would know. There were a lot of people there and maybe a lot of other memorandums made by other people that he knows nothing about.

Mr. Sawyer: I will rephrase the question.

By Mr. Sawyer:

Q. Was there ever made in your presence or to your knowledge a memorandum by anyone as to the agreement reached at that meeting?

A. No, Sir.

Mr. Ward: That is objected to.

Mr. Nizer: He has answered the question.

(5185)

The Court: Well, he may answer the question. Did you ever hear of anything called the "Schwalberg agreement," first of all? Yes or no.

The Witness: At this meeting?

The Court: No, subsequently.

The Witness: Well, I don't know anything about a Schwalberg agreement. I have heard it bandied around, blown up into something that is just such a myth, that I just think that—

(5186)

By Mr. Sawyer:

Q. Well, whether it is a myth or not, Mr. Goldman—

A. Myth?

Q. —did you ever hear of the document?

A. There is no such thing as a Schwalberg agreement, Mr.—

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(5190)

Mr. Nizer: For months before the pretrial statement, the pretrial conference, Your Honor has heard the attempted mysterious references to what is called the "Schwalberg agreement" by the plaintiff, who again says this is critical and suggests to Your Honor that there is a document which he wants to confront the witness with.

Now, this attempt to create mystery around the situation ought to end, and as long as we are now at side bar and the issue has arisen, let me tell Your

Honor what the facts are, and Mr. Sawyer may learn therefrom at the same time, and then he can go into the matter, because Mr. Schwalberg is going to be present in court, and so that

(5191)

what I am stating to him now is only advance information of what the facts are; and there is no mystery about this at all and it is much ado about nothing.

This is the situation: At the time that the controversy between Goldman and Stanley Warner and Warners and Paramount was disposed of, this meeting he referred to—and Your Honor will recall that Goldman actually started a suit against these companies, but we have all agreed not to mention the suit, so we call it a "controversy"—but that is what these conspirators, alleged conspirators were doing—suing each other.

Schwalberg attempted to settle that controversy. Paramount was sued.

So they met in his office and they arranged that Paramount would give them a split similar to other splits, except varying in certain ways which are unimportant for this purpose.

Mr. Goffman: May I just correct that implication in your last statement and state that Warner Brothers was not present at that meeting.

Mr. Nizer: Not present—you are quite right—and if I gave that implication, it was wrong. This was done with Paramount and Paramount's counsel. There was a lawsuit pending.

(5192)

No agreement was ever drawn. No document was made. They became friends again. The whole purpose, Mr. Schwalberg said, "We have got to do business

with each other; all right, we will split with you and we will work it out that way."

Mr. Schwalberg leaves the Paramount Company, and two years later, due to circumstances which Mr. Schwalberg will testify to—and I won't therefore go into it—he prepares a memo because of certain statements that have been made about two years ago before when he was with Paramount—which, as I say, I will go into if it is desirable, but for this purpose I will skip it—he prepares two years later a document, he types up to refresh his mind and to state to somebody who has asked him about this, what that understanding was at the time.

It was not an agreement. It was what occurred at this meeting.

This memo, naturally, was not in the Paramount file, because he was out of the company for two years. I didn't know that. I don't believe Mr. Sawyer knew it until this minute, and I really don't blame Mr. Sawyer for thinking that this was a Paramount memo which fell into his hands, but the fact is when we during the entire course of this proceeding, we were asked for this document

(5193)

and nobody could find it; and we are dealing with a responsible company and with Mr. Louis Phillips, and with Mr. Austin Kehoe, who was a director of Dartmouth and a distinguished lawyer.

Mr. Sawyer: Oh.

Mr. Nizer: They said, "Well, there is no such document in our files"—and there wasn't. It had not been prepared until two years after Mr. Schwalberg left. This is the involvement here.

Due to the Arcadia suit, which again we cannot mention, there were certain discovery proceedings, and

how, I do not know—and there is nothing wrong with it—but for some reason this memo which Mr. Schwalberg had drawn two years later was found by one of the attorneys in the Arcadia suit and thus handed over to Mr. Kohn who at one time had been the counsel in that suit.

So they have a memo, not signed or anything, and it is a memo not of an agreement—of a recollection by Mr. Schwalberg, which we have never seen in our lives and don't know of its existence about, we being Paramount, or any defendant here.

Nevertheless—

Mr. Sawyer: Well, Mr. Rome has had the thing three months.

(5194)

Mr. Nizer: Well, just let me—he has it what?

Mr. Rome: It is not true, Mr. Sawyer.

Mr. Nizer: No. It finally came out in this deposition. Let me tell you the fact.

Mr. Sawyer: Well, sure, I mean, but he had it before the trial, if that is what you mean.

Mr. Nizer: Oh, yes.

Mr. Sawyer: All right.

Mr. Nizer: He knew it before the trial.

Mr. Sawyer: All right.

Mr. Nizer: We knew of it. That is why we resented your comments about the mysterious insidious document at pretrial. We knew it then.

Mr. Sawyer: Well, the mystery is getting thicker, but go ahead.

Mr. Nizer: I don't think it is at all, unless you want to just characterize it. There is nothing to this, and you have got Mr. Schwalberg on your list.

So I am at the point, Your Honor, of explaining that we have no such document. It doesn't belong in our file. It wasn't prepared contemporaneously with the event and therefore shouldn't be in our file.

But the plaintiff is constantly saying, "Where is this Schwalberg agreement?" And he may innocently.

(5195)

I don't say this is demagoguery. He may have thought that this document was prepared at the time of the conference. He may have thought so or still does to this minute.

The Court: Who?

Mr. Nizer: Mr. Sawyer's predecessor or Mr. Sawyer. I am not blaming them, because when I first heard about this, I wanted to inquire how is it that we didn't have this document in our file, and the explanation was, "We have never seen such a document. Our files have been canvassed and explored in these suits. Maybe somebody picked it up."

But now I know why it wasn't there. It was prepared two years later, as is evident, and as the sworn testimony will show.

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(5235)

THIRTY-FIRST DAY

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(5238)

Mr. Sawyer: All right, sir. My offer of proof with respect to this pointt—there will be one or two other

(5239)

points in Mr. Cincotta's testimony, but the point that is objected to is to prove that at a meeting in New York Mr. Cincotta, then I believe Executive Vice-President of the Greenfield Company—I am not exactly sure of his title, but I think that is right—and in charge of selling the property for Stanley Warner known as the Aldine Theatre, was told by Mr. Ben Wirth, the head of the Real Estate Department of the Stanley Warner Management Corporation, that he had put the Stanley Company in a very bad position, by having sold this property to someone who intended to use it as a theatre, because Stanley Company had an agreement with Bill Goldman that the Aldine Theatre would be closed and would never be again operated as a theatre.

This is being offered as an extrajudicial admission.

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(5272)

The Court: Gentlemen, with respect to the proposed Cincotta testimony, I sustain the objections of the defendants for the reasons advanced by Mr. Wolf in his brief and oral argument.

Now, as I indicated, I desire at this time

(5273)

to rule as to the admissibility of what is now revised Schedule A.

This is the matter briefed by plaintiff under the caption of "Plaintiff's Memorandum Concerning the Proof and Computation of Damages."

At page 12 of my Fourth Pretrial Order dated February 26, 1960, it was ruled:

"Thus, if and when the issue of damage is reached, the local comparison method can be submitted if there then be sufficient foundation in the evidence for an inference that the wrong of defendants has prevented precise computation of plaintiff's damage."

That ruling was prefaced by the following at the same page:

"Defendants have, and will have at trial, the right to argue that the comparison is inapt. Defendants will be given every opportunity to point out to the jury any respects in which they deem the comparison to be deficient or distorted."

According to the "average comparison approach," the measure of damages is the difference between the average gross less film rental of the now seven theatres owned by the defendant-exhibitors and the gross less film

(5274)

rental realized by the Viking. Both figures of course, are limited to the period in suit, July 2, 1954 to November 13, 1956.

Revised Schedule A is the tabulation based on that method. It shows that the average of the seven local theatres owned by the defendant-exhibitors to have been $960,000 (in round figures) as opposed to the same figure (gross minus film rental) for Viking to have been $570,000 (round figures).

Defendants have objected to the use of this Schedule A tabulation. Under the authorities, and for the reasons (and subject to the same qualifications stated

in the Fourth Pretrial Memorandum from which quotation is made is made above) the defendants' objection is overruled.

As I see it, the touchstone of authority on this question is Bigelow versus RKO Radio Pictures, 327 U. S. 251 (1946).

There a theatre on the south side of Chicago brought an action under the antitrust laws against a number of distributors and Chicago exhibitors. At the trial, the comparative earnings method had been used (327 U. S. at 257). A jury verdict for plaintiffs was trebled by the United States District Court for the Northern District of Illinois.

The United States Court of Appeals for the

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Seventh Circuit reversed on the ground that the proof of damages was too uncertain and speculative to permit recovery under the following principle: (150 F. 2nd 877, 884)

"In suits under our anti-trust laws for claimed loss of profits, speculation is not permitted to take the place of proof of the fact of damage, although if the fact of damage is proved, the amount may be reasonably approximated if based upon competent evidence."

I interpolate here, Mr. Sawyer, in that I have indicated to you that I think—and I quoted here—that there is a difference between the fact of damage and the amount of damage, and my conclusion now on many of the cases that appeared in Mr. Young's brief in that the fact of damage means whether the conspiracy is present, whether the plaintiff was damaged by reason of the wrongful act, and that is different and has to be established before the amount of damage is competent. In other words, I think the reason-

ing of those cases is that ordinarily you have to establish liability before you can claim damages, and if you differ as to that, I would like your briefs.

In the United States Supreme Court, however, it was said, in the course of reversing the Court of Appeals and restoring the judgment of the District Court:

(5276)

(327 U. S. 251 at 264)

"But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as direct and positive proof."

The foregoing principles were applied and discussed in a review of a non-jury judgment in Milwaukee Towne Corporation versus Loew's Inc., et al, 190 F. 2d 561 (citing the foregoing cases.)

Again, in Charles Rubenstein, Inc., versus Columbia Pictures Corp., 176 F. Supp. 527 is to be seen a rather full illustration of the necessary steps in using comparative figures as a basis for damages in another non-jury case.

Nearer at hand, however, is the decision of Judge Kirkpatrick in William Goldman Theatres versus Loew's, Inc., 69 F. Supp. 103, based on a full discussion of the Bigelow case at page 106. In his findings of fact and conclusions of law, Judge Kirkpatrick indicated some of the minus factors to be applied to the plaintiff's theory of average profits of the defendants' theatres, which figures the Court did not take to be controlling, and concluded:

"I do not pretend that there is not an

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element of speculation or guesswork in making an estimate of probable profits on the evidence presented.

The fact, however, that only approximate accuracy is required by the decisions of the Supreme Court indicates that no one expects the impossible and that every estimate of what would have occurred under hypothetical conditions is bound to contain elements of speculation. But the evidence, I think, is sufficient on which to reach a reasoned conclusion the basis of which is relevant, informative and logically significant data."

Now, I can well understand it can reasonably be argued, as presented by the defendants, that these authorities do not apply to this case since, in them, the wrong of the defendants was practically admitted since plaintiff got no pictures at all. Here, the wrong if any, is not so well defined since plaintiff did get some pictures and given the opportunity to present bids.

However, under the foregoing authorities, the objection of the defendants, as I have indicated, is overruled. This Court adheres to the Pretrial Ruling as heretofore stated; and the matter of special instructions to the jury as to the manner in which it may apply the Schedule A comparisons will necessarily await further development of plaintiff's case and defendants' rebuttal

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during the course of the trial.

Now, under that decision, I have ruled that revised Schedule A is competent at an appropriate time; however, because of the weight, again in my judgment, and again comparison, for the same reasons that I gave cautionary instructions to the jury on the comparison of bids, I have in mind now that I will do the same thing with respect to Schedule A as to the weight, because I want Mr. Wren to testify as

to how it is made up and the theory and the computation and then subject to any cross-examination by the defendants as to the weaknesses of the comparisons.

Let it also be understood, Mr. Sawyer, that when the chart is shown to the jury, that when it is presented and Mr. Wren is examined, the jury may look at it and see the figures, and so on, but I want it removed then.

Now, I say that because that is my ordinary procedure. In an ordinary case, a death action in an FELA case, plaintiff frequently will put on life expectancy, $7,000 a year times 41, reduced to present worth, pain and suffering, a question mark; widow and children, and so on. I permit the jury to look at those figures, but as soon as that computation is presented, I have it erased, because I think that it is prejudicial to a defendant. In other words, the damages in this FELA case have nothing to do with the

(5279)

liability, and I can understand that it is prejudicial if the jury sees a lot of big figures, and since it has nothing to do with the liability, I always have the figures immediately erased so that the jury won't be constantly looking at them. You can understand that.

Mr. Sawyer: I understand that, Your Honor; yes, sir.

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WILLIAM GOLDMAN, resumed.

DIRECT EXAMINATION (Continued)

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(5281)

By Mr. Sawyer:

Q. Now, Mr. Goldman, I show you a document consisting of two pages, which has been marked for identification P-190, and I will ask you to look at it and examine it, if you will.

(5282)

A. Yes, sir.

Q. Does that refresh your recollection as to whether or not there was ever a memorandum made of the agreement reached at the meeting between you and Mr. Schwalberg?

A. It does not.

Q. Have you ever seen that document or a copy thereof before?

A. No, sir.

Q. Were you ever asked by your counsel with respect to whether or not you had seen or could authenticate that document?

A. Yes, sir.

Q. Or a photostat thereof?

A. Yes, sir.

Q. What was your reply? Was your reply then that you could not?

A. I had no recollection at all, sir.

Q. And you do not know anything as to the origin of that document?

A. No, sir.

Q. Nothing whatsoever?

A. None.

Q. And you are quite certain, are you, Mr. Goldman, having examined it at length and carefully. Did you read it all?

(5283)

A. I am very positive.

Q. Did you look at both sheets of it?

A. Yes, sir, I looked at the front of it and back of it.

Q. And you are quite positive that you—

A. There are no names, or initials, or signatures—

Q. That is right.

A. —or dates, or anything.

Q. But aside from that, you are quite positive that you have—

A. I am very positive, yes, sir.

Q. You have never seen that document before?

A. No, sir.

Q. And when I say "that document," you understand that I include the original of it or any other photostat.

A. Never anything about it, I have only seen this.

Q. But your answer—

A. Nothing that resembles this.

Q. All right, and your answer therefore includes any other photostat—

A. Yes.

Q. —copy or original thereof?

A. Yes, unqualifiedly.

Q. Now, to come back to the meeting itself then, without regard to the document.

(5284)

A. Yes.

Q. To come back to the meeting itself. Now you have told us I believe that that meeting was held in New York in 1953, and that Mr. Minsky, and Mr. Schwalberg, and Mr. Fabian, and Mr. Austin Kehoe were present, and yourself, is that right?

A. Yes, sir, and I made reference to Mr. Kalmine, and I said I wasn't certain about that.

Q. You weren't certain about Mr. Kalmine?

A. No, sir.

Q. Now, did you reach any agreement at this meeting with respect to how Paramount films would be licensed—sold and licensed first-run Philadelphia, and if so, what was it?

A. Well, when you say "agreement," reached an arrangement—

Q. Whatever you wish to call it.

A. Yes. Well, I think that is preferable.

The arrangement substantially was this, that the pictures would be split, and that Paramount, with Mr. Minsky as their representative in Philadelphia, would be the man who would recognize the split, Warner's or myself, and where the particular picture for the particular theatre would play because of its suitability, depending entirely upon the attraction.

Moreover, it was pointed out and made very positive to me, that under the circumstances of anybody, any

(5285)

independent exhibitor who indicated an interest in the picture, that we had to meet that competition. I don't recall whether the Viking was then operating. In fact, I am sure of it.

I had said this, that I would not bid for any pictures. I hoped that I would have the opportunity to negotiate for pictures.

That pretty much expresses the essence of the entire arrangement. I don't think I was much more than possibly a half an hour or an hour at that meeting and I left.

Q. Wasn't there more to it than that, Mr. Goldman; wasn't there another significant feature to the agreement that you haven't mentioned?

A. I don't recall, sir, no, sir.

Q. Well, what was to happen under that agreement, Mr. Goldman, if a picture, assuming it was on your side of the split—

A. Yes.

Q. I am talking about a picture on your side of the split.

A. Yes.

Q. What was to happen if there were bids from other exhibitors, that is, not Stanley Warner, because they wouldn't be bidding, but from other exhibitors—

(5286)

A. Yes.

Q. —and those bids were rejected by Paramount?

A. Yes.

Q. Then what was to happen under this arrangement, as you say?

A. What was to happen?

Q. Yes, what was to happen then?

A. Nothing that I recall.

Q. Nothing was to happen then?

A. No, sir.

Q. Wasn't it agreed that if Paramount rejected all the bids they would then come to you and negotiate with you?

A. You mean me exclusively?

Q. Yes.

A. No, sir.

Q. And wasn't it agreed that if they rejected all bids from others and they came to you to negotiate, that they would not then go back to the rejected bidders?

A. Positively not.

Q. You are sure that that was not the agreement?

A. I am certain. There was nothing given to me exclusively that no other exhibitor could have the same opportunity, Mr. Sawyer. That just didn't happen, it was never discussed, and I was never laboring under that impression under any

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circumstances.

* * *

Q. Now, just to make it clear, you stated to us then it was not a feature of this agreement or arrangement that when and if a picture being on your side of the split, all other bids were rejected, that Paramount was then to come and negotiate with you for the picture?

A. Not me exclusively.

* * *

(5288)

Q. Thereafter, Mr. Goldman, did Paramount from then on split its product as they agreed to do?

A. In the manner which I described, yes.

Q. Yes, and what about Warner Bros., did they split?

A. Warner Bros.?

Q. Yes. They hadn't been spliting up until this time, the time—

A. Well now, if you are referring to the meeting in the Paramount office, at that time, that is right, sir.

Q. Yes. Thereafter what happened with respect to Warner Bros. if anything?

A. Well, the arrangement similiar in character was effectuated.

(5289)

Mr. Kalmenson, whom I never knew at Warner Bros., said: I would like to see what Bill Goldman looks like. And he came to Philadelphia.

He wanted to examine the theatres. He was curious about what kind of theatres we had. He wanted to know whether I was a competent operator.

He went into great length to determine whether I was the man he wanted to entrust with pictures if he was going to split them.

But always I had in mind that when he was going to split pictures with me, Mr. Sawyer, they were not going to be exclusively mine. I was never under that impression. Mr. Kalmenson did come to Philadelphia and I met him for the first time. He examined our theatres. He knew of me by reputation. Having been in this business for 50 years, I didn't have to tell him much about myself that he didn't already know.

Q. What I am most interested in—I think that is perfectly all right, but what I want to know is—

A. Well, this is one of the qualifying things.

I don't think any producer would just simply entrust any man, any exhibitor, with a picture, unless he thought he was competent to run his theatre.

Q. No, Mr. Goldman, my question is this: Did Warner Bros.

(5290)

agree before Mr. Kalmenson came or—

A. Did it? Oh, no, sir, no, sir.

Q. Was the agreement reached when he came to Philadelphia between you and him?

A. I wouldn't say that it had been agreed at that time, no, sir, Your Honor, he came down and he wanted to look me over. It was like looking at a horse that you are going to buy, and I suppose I was Exhibit A.

Q. Up to that point Warner Bros. had refused to split, hadn't they?

A. That is right, sir.

* * *

Q. I will ask you this: When Mr. Kalmenson came did he

(5291)

come with the understanding that if you seemed to him to be an all right person he was going to go ahead and split his product?

A. Well, he didn't say at that time.

Q. When? Did he—

A. Oh, I don't know how much time eventuated, but subsequently I did hear that he said, I would consent to this split. And with the qualification that under no circumstances there were any pictures on my split that belonged to me as excluding anybody else. I had to bid for the pictures in the same manner I do even at the present time.

(5292)

Q. Well, you didn't bid for any Warner Brothers pictures, did you?

A. Well, I didn't bid at that time, no, sir, but—

Q. Well, did you?

A. But I am bidding now.

* * *

(5304)

Q. Now will you accept, Mr. Goldman, subject to check, first of all,—

A. Yes.

Q. —that during this period, and I have given you the dates—

A. This period?

Q. This period of the suit, July 2nd up until November 19, 1956, your theatres played 20 Warner Brothers pictures?

Mr. Goffman: That is objected to, Your Honor, as going beyond the rulings of this Court on the pictures involved in this suit.

Mr. Rome: I thought Your Honor had already ruled on that earlier.

The Court: Yes.

Mr. Sawyer: I thought His Honor said go ahead. I want to cross-examine.

The Court: No, no. As to the 5 pictures, as I understand it, he says he bid on them; you say he didn't.

Mr. Sawyer: I can't show in proportion to how many he played and how many he bid on?

The Court: No.

Mr. Sawyer: All right.

The Court: My ruling is, Mr. Sawyer (and I adhere to it even in this examination) to show on the point

(5305)

of bidding, not bidding, negotiating, splits, and so on, that he cannot show any other picctures, and I restate for the purposes of the record that I eliminate them from the consideration of the jury entirely because Viking wasn't harmed in any way, Viking never submitted a bid, regardless of how Mr. Goldman got the pictures, or Stanley Warner or anybody else, any other theatres in Philadelphia.

To me it is not in this case because Viking couldn't be harmed no matter whether they gave the pictures to Goldman.

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(5320)

Q. I ask you now, Mr. Goldman, do you wish now to change your statement, in view of that list, that the agreement with Mr. Kalmenson was that in spite of the split you would still have to submit bids?

A. Absolutely.

Q. Absolutely that was the agreement?

A. We had to bid for pictures; yes, sir.

Q. But, in fact, you didn't; is that correct?

A. And with the qualification that you objected to, that we, under every circumstance, we had to permit every

—that they had to extend the same offer to other exhibitors.

Q. Well, now, that isn't my question, Mr. Goldman.

(5321)

A. Well, I am sure about it.

Q. My question is whether or not you did not state that the result of the agreement you had with Mr. Kalmenson you still would have to bid for pictures; did you state that?

A. Yes, sir.

Q. Was that the agreement?

A. He said so.

Q. He said so?

A. That is right.

Q. All right; now, during the entire period of the suit, how many pictures did you, in fact, bid on?

A. Well, I think Mr.—

Q. Warner Brothers.

A. I think Mr. —

Mr. Rome: It has already been stipulated, sir.

Mr. Sawyer: Well, he keeps denying it.

By Mr. Sawyer:

Q. Now, how many did you, in fact?

A. Well, I can't read this as intelligently as Mr. Beattie, because it is—

* * *

(5322)

Q. Mr. Goldman, how many Warner Brothers pictures are on that list?

A. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13—

Q. Warner Brothers pictures, Mr. Goldman.

(5323)

A. Oh, I see. I am sorry.

Q. The agreement was with Mr. Kalmenson of Warner Brothers, was it not?

A. There are two Warner pictures on there.

Q. Two Warner Brothers pictures?

A. Yes, sir.

Q. Very well. Thank you.

So that whatever the agreement was with Mr. Kalmenson, the fact is that during the entire period, if this document is correct as filed in this lawsuit by Mr. George Beattie, if it is correct, you only, in fact, made any kind of a bid, oral or written, on two Warner Brothers pictures; is that correct?

A. No. That isn't the question you asked me. You said, "How many Warner pictures are on that?"

Q. All right; if this list—Mr. Goldman, you understand this, don't you?

A. No. I understand—

Q. You don't, really?

A. I understand one thing.

Q. All right.

A. You said, "How many Warner pictures are on that list?"

Q. Do you know what the list—

A. And I answered you.

(5324)

Q. Do you know what the list purports to be, what it is a list of?

A. Well, you tell me and see if I can understand you.

Q. Well, I started out and I will have to go through it again. I showed you the question as to which this is the answer.

A. Yes, sir.

Q. Now, the question was put to you by us, the plaintiffs.

A. Right.

Q. And we asked you and you read it, I believe

A. That is right. I read it.

Q. I don't know whether you read it loud enough for the stenographer to get.

A. Well, then I will read it again. See if—is this No. 1?

Q. Yes.

A. It states as follows:—

Mr. Rome: Just to yourself, Mr. Goldman.

The Witness: I beg your pardon?

Mr. Rome: Just to yourself and not have Mr. Sawyer read it into the record.

Mr. Sawyer: No. Read it aloud so we get back on the track.

(5325)

The Court: Let him read it any way he wants to.

The Witness: I understand it, sir; yes, sir.

By Mr. Sawyer:

Q. Now, having read that—

A. Yes, sir.

Q. —and, if I say that this is the answer to that question which was filed by William Goldman Theatres, sworn and subscribed to by George Beattie, would you then answer me, answer for me, what it is a list of?

A. This is a list of pictures by various distributors in which theatres or the dates of the bid and successful bidder, the date of the award.

Q. And what pictures are listed there? What pictures?

A. What pictures?

Q. Not by name.

A. You mean by name?

Q. No, not by name.

A. Paramount.

Q. Oh.

A. You mean distributor? Well, then, state it again. I don't under—

Q. Mr. Goldman,—

A. I—listen, I—

(5326)

Q. Mr. Goldman:

A. I try to understand you. I think I said—

Q. Isn't this a list of pictures on which you submitted—

A. That wasn't what you said.

Q. —either a written or oral bid?

A. That wasn't what you said. That wasn't what you said. You said, "List of names of the pictures."

Q. Yes. What is it a list of?

A. It is a list of pictures.

Q. On which you submitted an oral or a written bid? Is that what it is a list of?

A. Oh, yes, sir.

Q. Oh, very well.

Now, do you now understand that it is a list of pictures on which you submitted an oral or a written bid—

A. Yes, sir.

Q. —for the period of this lawsuit?

A. Yes, sir.

Q. Now, we agree on that?

A. Yes, sir.

Q. And then it is not the case that whatever the agreement with Mr. Kalmenson was,—

A. Yes.

Q. —that, in fact, during the entire period of this lawsuit

(5327)

you only submitted bids, oral or written, on two Warner Brothers pictures?

A. From this list; yes, sir.

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(5328)

Q. Now, Mr. Goldman, your having testified that the split was introduced with respect to the other distributors prior to the summer of 1953, that then you effectuated it with Paramount, and now having testified as to the institution of it with Warner Brothers, that having been completed were all of these distributors then splitting product or permitting you and Stanley Warner to split product, depending on how it was done?

A. Yes, sir.

Q. Everybody that was on the split?

A. Yes, sir.

Q. Let me ask you on that—I am speaking now of the early splits, the Loew's, and the splits that existed in the spring of 1953, before the Paramount split, at that time did the split include the Aldine Theatre?

A. I presume it did.

Q. It did. In other words, part of the split arrangement?

A. I wouldn't know anything about it. I would assume so if Warners were operating it.

Q. Stanley Warner was operating it then.

A. And I assume any picture on the split they would play anywhere they wanted if they got the picture.

Q. That is right. And you didn't compete then at that time

(5329)

for products given to the Aldine Theatre, one of the Stanley Warner Theatres?

A. No, sir.

Q. You mean no, you did not?

A. That is right.

Q. Now, did there come a time that the nature of the agreement with Paramount was changed?

A. Changed?

Q. Yes.

A. It was never changed.

Q. It was not changed?

A. No, sir.

Q. Didn't you have a meeting in New York at the Plaza in 1955 with Mr. Weltner and Harry Kalmine?

A. Well, we had a disagreement about the manner, the interpretation of what I understood was definitely agreed.

Q. What was the disagreement, Mr. Goldman?

A. Sir?

Q. What was the disagreement, Mr. Goldman?

A. I am trying to recall just what the circumstances were, but I—I think it had to do with pictures that I had negotiated on and which I felt that an adjustment should be made on the pictures.

(5330)

Q. So it is your testimony that at this meeting—by the way, who was Mr. Weltner? Let me get that straight.

A. Mr. Weltner?

Q. Yes.

A. He succeeded Mr.—I am sorry, I don't know whether he succeeded Mr. Schwalberg or not. But I think he is the president of Paramount Company.

Q. He succeeded Mr. Schwalberg, did he not, as president of Paramount?

A. I think he did, yes.

Q. And didn't you have a meeting with him?

A. Yes.

Q. In New York in the summer of 1955?

A. Yes, sir.

Q. Who was present at that meeting?

A. Well, Mr. Weltner and myself. I don't know if Mr. Beattie was with me or not. You have the advantage. I don't remember. But I know Mr. Weltner and I were there.

Q. And with Harry Kalmine—

A. I think Harry—

Q. —there?

A. Yes, he was there.

Q. Who is Harry Kalmine?

(5331)

A. Harry Kalmine is associated with Mr. Fabian's theatres.

Q. Well, he was General Manager of Stanley Warner, right?

A. Yes, sir.

Q. And was anyone else there, do you recall?

A. There could very well have been. I have—

Q. Counsel was present, was he not, Mr. Louis Phillips?

A. Yes, sir.

Q. Now, you tell me the subject of that meeting was adjustments?

A. Not adjustments. On pictures that I negotiated—

Q. Yes.

A. And accepting their national terms, if the picture didn't warrant the terms, the national terms that were designated before the picture had an opportunity to play, I felt that there should be consideration given to me. I had no right to demand it. I just asked that I thought that consideration should be given to me.

Q. At that meeting, Mr. Goldman, didn't Paramount representatives seek to persuade you to relinquish certain rights you had under the agreement which you reached with Mr. Schwalberg?

A. I don't know what you mean by rights.

Q. Well, whatever those rights were. Wasn't the gist of that

(5332)

meeting that they sought to persuade you that certain commitments that Paramount made you should no longer hold them to?

A. I had no—nothing that I was relinquishing to them, because I had nothing.

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(5333)

Mr. Nizer:

(5334)

The difficulty we face here is rather unique. In all of this testimony he is skirting some of the elements of it because of an instruction by counsel not to mention the lawsuit which was really the essence of this meeting, and this refers really to their difficulty because of the litigation, that is the reason for referring to a decree and so on. Now, the trouble is having a witness whom we handcuff by instructions not to refer to certain things, while Mr. Sawyer, not intending to violate that instruction, asks questions which require really an explanation of some of these matters that we have all agreed should be kept out, all of us.

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(5349)

Q. Now, Mr. Goldman, I understand your testimony is that at some meetings at the Plaza Hotel in New York with Weltner and these other gentlemen the purpose of that meeting was not to persuade you to give up certain rights you had in your agreement with Mr. Schwalberg.

A. Persuade me not to give up?

Q. Yes.

A. I don't understand.

Q. I will put it another way.

Wasn't the purpose of it to persuade you to give up certain rights that you had in the agreement with Mr. Schwalberg?

A. I don't remember. I never had any rights other than a splitting arrangement with Paramount.

Q. Didn't they try to seek to persuade you not to hold Paramount to certain commitments that Mr. Schwalberg had made on behalf of Paramount?

A. Didn't what?

Q. Didn't they seek to persuade you, Mr. Goldman, at that meeting not to hold Paramount to certain commitments that Mr. Schwalberg had made on Paramount's behalf?

A. I don't know of any other commitments, other than I

(5350)

have recited to you.

Q. Well, whether you know of any other commitments, wasn't that the purpose of the meeting?

A. Well, I think they would extend the same courtesy to any other exhibitor who was dissatisfied with the treatment—

• • •

Q. Now I will put it this way:

Mr. Goldman, will you state in your own words exactly what was discussed at that meeting, what was the subject, what did Mr. Weltner say, and what did you say in your best recollection?

A. My best recollection is Mr. Weltner was a new man who succeeded Mr. Schwalberg. He was in the capacity as a peacemaker and wanted to know whether I just wouldn't go along now and forget whatever the grievances were that I had; and I think I indicated that I was going to go along

(5351)

and that's about the extent of it.

Q. Well, was it a question of forgetting grievances or was it a question of forgetting the fact that you had this agreement with Schwalberg?

Wasn't that the point, Mr. Goldman?

A. I had no agreement with Mr. Schwalberg. I had an arrangement with Paramount.

Q. I show you a letter which has been marked P-7 for identification and ask you to take a look at that document.

A. Yes, sir.

Q. Being two pages.

A. Yes, sir. I have read the document.

Q. To whom is that letter addressed?

A. To me, sir.

Q. And from whom is the letter?

A. This is a letter from George Weltner.

Q. All right. You received that letter, did you?

A. Yes, sir.

Mr. Sawyer: Now, Your Honor, I would like to read it to the jury.

The Court: Very well.

Mr. Sawyer: Paramount Film Distributing Corporation, Times Square, New York 38, Telephone No. —George Weltner, President, November 12, 1955:

(5352)

"Mr. William Goldman
William Goldman Theatres, Inc.
Goldman Theatre
Philadelphia, Pa.

"Dear Bill:

"At our conference at the Hotel Plaza last Thursday, at which Harry Kalmine and Louis Phillips were also present, you turned to me and said, 'George, let us forget there ever was an agreement between Paramount and me, made with Al Schwalberg. I won't ever hold Paramount to it. I want to be a Paramount customer. Let us do business with a clean start.' If this is not accurate, word for word, it is in substance.

"I expressed my appreciation and stated that we wanted you as a customer. We then tried to work out a formula that would be mutually satisfactory and practical, and yet would not put us in a position where anyone could rightly claim that we favored you and discriminated against him. At this meeting we could not come up with such a formula; one that was satisfactory to you.

"I have given this matter much thought since, and have sought a formula that would be practical from a business standpoint and not be violativve of our decree.

(5353)

I would be willing to try the following for six months from January 1, 1956 and thereafter as long as we think it will work fairly and practically.

"Our product would be split into two parts, each part equal in number and quality of pictures. These splits would be made quarterly or semi-annually, depending on the number of pictures we will have for licensing in each period, beginning January 1, 1956. You and Warner will make and select the splits alternately.

"On the A split, Warner and all exhibitors who desire to do so, would bid on each picture as we send out requests for bids. On this split you would not bid.

"On the B split, you and all exhibitors who desire to do so, would bid on each picture as we send out requests for bids. On this split, Warner would not bid.

"We would award the picture to that exhibitor whose bid, in our judgment, on the terms offered, would produce the greatest film rentals.

"We will not reject any bid for inadequacy and thereafter start the bidding process over again, or resort to re-negotiation, but will award the

(5354)

picture on the bids submitted in the first instance.

"If there are no bids on a picture and the picture is on your split, we will negotiate with you therefor.

"While we have always reserved the right to reject bids to assure ourselves against inadequate bids or collusion among exhibitors, we are willing to depart from our regular procedure for a limited time, in the hope it will resolve our differences.

"We are willing to make this experiment in Philadelphia, since we believe that the competition there is such that there is little danger of collusion among exhibitors.

"You will, of course, understand, Bill, that in case of some few pictures which we want to handle specially, this procedure will not apply, but you may be assured, as to these, you will have an equal opportunity with all exhibitors to license each such picture.

"The procedure here outlined is, I believe, eminently fair and ought to appeal to you and all exhibitors in Philadelphia interested in licensing our pictures there, first run.

"Please let me hear from you at your earliest

(5355)

convenience.

"Sincerely,

"(s) George Weltner

"George Weltner."

By Mr. Sawyer:

Q. Now, Mr. Goldman, doesn't that letter indicate to you that you were asked at that meeting to change the arrangement that you had previously when Mr. Schwalberg was president?

A. It doesn't change a thing.

Q. It doesn't indicate that to you?

A. No, sir.

Q. Did Mr. Weltner in this letter correctly quote you when he said that you turned to them in the Hotel Plaza on Thursday, and then the quote that I read?

Was that the substance of what you had said to Mr. Weltner, that which is in that letter?

A. That's his quote. I don't recall that I said that.

Q. Do you want me to re-read it to refresh it to you again?

A. It wouldn't help me at all because I have no recollection.

Q. Now you don't recollect whether you ever said, as he said you said, that you would not hold Paramount to the agreement made with Al Schwalberg?

(5356)

A. Well, I think the moral responsibility there is the question of adjustments on pictures that they had put national designations on.

Q. Does this letter say anything about adjustments?

Mr. Rome: Just a moment.

Mr. Sawyer: I thought he was finished.

By Mr. Sawyer:

Q. You were finished, weren't you?

A. No. When they put national designations—Mr. Wren was here talking about a picture hindsight. I happened to look at this picture first and they put a price

tag on it first and the picture didn't do well. That was my real grievance.

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(5358)

Q. Now, Mr. Goldman, you stated here or it is stated here by Mr. Weltner—I read you something else that he stated you said and you didn't recollect it.

Now I ask you if you recollect this, that he says in his letter you stated, that you turned to him and said, "George, let us forget there ever was an agreement between Paramount and me, made with Al Schwalberg."

Now do you recall saying that to Mr. Weltner?

A. Well, I can only tell you this—my disposition is to always be amicable. Undoubtedly, I must have said to him let bygones be bygones.

My grievance, as I stated to you, was the fact that they had looked at the pictures at the studios, they put a price on them, they asked when the picture was designated, if I won it by an award, and I thought I had a

(5359)

reasonable complaint—

Q. All right.

A. —to go in and say, "You had said this picture was a good picture that was going to do a certain business;" and if I lost money I thought I was reasonably entitled to be considered.

And when you refer to my giving up something, I was only giving up a moral position, that was all.

Q. Now, Mr. Goldman, that is very interesting. It is not what I asked you.

A. But it is a fact and I think it is very discourteous for you to say that.

Q. Mr. Goldman, will you please answer my questions?

A. And not make innuendo.

Q. And not make other remarks which are not in any way responsive?

A. I know, but you are being discourteous.

Q. Please listen to my question, if you will.

A. Yes.

Q. My question didn't concern anything about a grievance. My question was this—did you say to Mr. George Weltner at the meeting in the Plaza Hotel, "George, let us forget there ever was an agreement between Paramount and me, made with Al Schwalberg"?

(5360)

Did you say that or words to that effect?

A. I wouldn't say that I said that, but I would say this—if I made any reference to it, it's an arrangement. I had no agreement. I said time and time again there is no agreement.

I have had no agreement. I have had an arrangement with them.

Q. All right. You have stated that.

Now this statement here that is attributed to you doesn't say anything about your saying let's forget grievances, does it?

It says let's forget an agreement, does it not?

A. Well, I am sure that's not a Bible inside to repeat anything that was said with respect to chapter and verse.

I am trying to give you at least the essence of what was in my mind and what I am now trying to recall as best I can.

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(5361)

Q. Is it your statement, Mr. Goldman, that what you were going to forget was not an agreement, but a grievance?

A. That's right.

Q. So that the gist of the meeting was that you were going to forget grievances that you had?

A. That's right.

Q. And the gist of the meeting wasn't as Mr. Weltner here said that you were going to forget about an agreement that you had; is that right?

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(5362)

The Witness: I think you have to understand Mr. Weltner, or pardon me, Mr. Sawyer, Mr. Weltner was a new man coming in—

By Mr. Sawyer:

Q. Now, Mr. Goldman, you have testified to that before.

A. I think I should paraphrase and tell you—I am trying to explain—

Q. Can you answer first?

(5363)

A. Beg pardon?

Q. Answer my question first and then if any explanation is required will you give it?

A. Yes, sir.

Q. Will you answer the question?

A. What is the question?

(The reporter again read the pending question.)

The Witness: There was nothing about an agreement. It was he acting as a peacemaker, trying to reconcile a customer's grievances in which he was hoping to be instrumental in bringing about a better relationship; that all.

Mr. Sawyer: Very well.

By Mr. Sawyer:

Q. Now this letter was written by the president of Paramount?

A. Yes, sir.

Q. Within a week after the meeting, according to what he says, "At our conference at the Hotel Plaza last Thursday;" is that correct?

A. Well, you have the date there. I will take your word for it.

Q. Not the date, but would you agree that you received this letter within the week, as he says, after the conference?

(5364)

A. If you say so, yes.

Q. And he states there what he recollects your statements were?

A. Yes.

Q. That is, at least in substance, as he puts it.

Now I understand that your recollection today as you are on the witness stand as to what your statements were and what the purpose of the meeting was is different than that which Mr. Weltner states in the letter; is that correct?

A. It is only as to—

Mr. Rome: I object to that.

The Witness: —as to interpretation.

Mr. Nizer: Just a moment.

By Mr. Sawyer:

Q. Is that right?

A. I say it's only different as to interpretation.

The Court: Overruled

By Mr. Sawyer:

Q. Well, interpretation, Mr. Goldman, actually varies, does it not, with respect to the subject matter involved?

A. I don't think it does.

Q. Don't you say that the subject matter involved in the luncheon was your grievance?

A. That's right.

(5365)

Q. And doesn't Mr. Weltner here say that the subject matter involved was your relinquishing of an agreement?

A. I have no—

Q. He says that; I am not asking you whether or not—

A. I understand that.

Q. That is what he says, isn't it?

A. I can only tell you, sir, that there was a grievance and that's what brought us together.

Q. I understand that, Mr. Goldman I don't mean to confuse you.

A. I had nothing to surrender. I owned nothing.

Q. Won't you agree with me that Mr. Weltner asserts—

A. I can't be responsible for what Mr. Weltner wrote in that letter.

Q. Will you agree that that is what he said in the letter?

A. I didn't dictate the letter. He wrote the letter.

Q. Will you agree that that is what he says in the letter?

A. You read it to the jury; they understood it.

Q. You were concerned then, as I understand, with your grievances with Paramount?

A. That's right.

Q. Your grievances?

A. That's right.

(5366)

Q. And that that was the only subject, your grievances with Paramount and the way they handled you?

A. With respect to pictures that they put national designations on—

Q. I understand.

A. —and where they were negotiated.

Now on bids you have no right to come back and we have never gone back and asked for anything because that's what you bid, see.

Q. Well, at that point you had never bid on a Paramount picture, had you?

A. No, sir; I don't think so.

Q. Then that wasn't a problem at that time, was it?

A. Only that I am trying to restate in a matter of my general conduct of my business, where I bid, not as to Paramount.

Q. This is a meeting with Paramount now.

A. I understand, but what I am talking about now is a general proposition. You said I don't bid. If you are confining yourself to Paramount, I'd answer I don't bid on Paramount pictures.

Q. All right.

At the time of this meeting, when you had this meeting, you had never at that point bid on a Paramount

(5367)

picture, had you?

A. I have no recollection, sir.

Q. All right, except the fact that you so state in those same answers, that you never had bid on a Paramount picture?

A. Well, without having the record in front of me—

Q. You don't have any recollection?

A. I would say as a general thing, yes, our position was stated that we won't bid on pictures.

Q. You have no recollection to the contrary, that by December 1955, when you had this meeting, you had never bid on a Paramount picture?

A. I wouldn't say that we didn't. I know at one time we decided we were going to bid, we were losing too many pictures.

Q. That was after this, wasn't it?

A. Well, I don't know. It may have been in that period, but we lost so many pictures.

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(5369)

Q. I will ask you, do you claim you made a bid on COUNTRY GIRL or not?

A. Yes, sir.

* * *

(5371)

The Court: Now we understand that apparently there is some question that Mr. Goldman or Goldman Theatres submitted a written bid to Paramount on such and such a date.

There is no question that it does not appear in the answers to the interrogatories, but Mr. Goldman said that he did submit a bid.

Mr. Sawyer: He just said from the witness stand an offer.

By Mr. Sawyer:

Q. Do you distinguish between the two, Mr. Goldman, a bid and an offer?

A. COUNTRY GIRL was a bid.

Q. It was a bid?

A. Yes, sir.

Q. And when Mr. Beattie signed that answer to interrogatories in which he was asked to state all the pictures on which there was an oral or a written bid and he made that statement under oath, was he wrong?

A. He wasn't in the office at the time. He was out sick. I personally made the bid myself.

Q. No, no, no, no, Mr. Goldman.

A. You are speaking of COUNTRY GIRL, aren't you?

Q. No, no. I am not speaking of COUNTRY GIRL; but when he stated in those answers to his interrogatories, he wasn't

(5372)

out sick when he took that oath that that was true, was he?

A. I don't know, but he knew nothing about COUNTRY GIRL because I bid on it myself.

* * *

(5378)

Q. And was there a problem about receiving adjustments on pictures on which you did not bid?

A. That I didn't bid?

Q. Yes.

A. No. There couldn't be. You mean on—that I didn't bid?

Q. Yes, that you negotiated.

A. Well, that was the grievance primarily that brought me to New York.

Q. The grievance was that you weren't getting adjustments on pictures on which you negotiated?

A. Not all pictures we had negotiated, just the quick pictures that I referred to with national designations where I thought there was justifiably a reason or a right to ask for an adjustment on those pictures. They didn't work out.

Q. And were you getting adjustments from Paramount during this period?

A. I don't recall.

Q. Well, you know you were getting adjustments; weren't you?

A. We may have. I don't remember.

Q. And was it that you wanted to get more adjustments than they were giving?

(5379)

A. No, sir.

Mr. Rome: He just stated that he didn't recall, sir.

By Mr. Sawyer:

Q. And now is this—when Mr. Weltner says this in his letter, "We then tried to work out a formula that would

be mutually satisfactory and practical, yet would not put us in a position where anyone could rightly claim that we favored you and discriminated against him. At this meeting we could not come up with such a formula, one that was satisfactory to you."

Now, what formula in your—do you recall that at the meeting?

A. Now that you read it, but I don't have any recollection discussing any formula. My purpose in going to New York was because of a grievance, and that is all I know about it.

Q. Well, this letter goes on—

A. Unless he is restating what he thinks was the arrangement that we made with Mr. Kehoe and Mr. Schwalberg in 1953.

Q. Well, now, if it was a question of a grievance on adjustments, Mr. Goldman, how is it that this letter proceeds to state a system for splitting and licensing pictures first run?

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(5380)

The Witness: I don't know why Mr. Weltner would refer to a formula. I knew in 1953 basically what the formula was. We were to split pictures, but they had a right to say the theaters that they preferred with respect to size or the location, the ability to earn for them, and also if I must repeat again, as repugnant as it may sound to you, that we had to meet competition, sir.

By Mr. Sawyer:

Q. Now, when Mr. Weltner, after saying that he had —you and he had tried to come up with a formula at lunch and had not succeeded—

A. I don't recall that we ever referred—

Q. —since—

A. —to a formula, sir.

Q. All right. Just a minute now.

—since after he stated that, then he states here, "I have given this matter much thought since and have sought a formula that would be practicable from a business standpoint. I would be willing to try the following for six months and thereafter as long as we think it will work fairly and practically."

(5381)

Now, then he suggests, does he not, without me reading it—we read it once—a system of splitting of pictures, the A splitting he mentions, and the B split, and then goes on to say, "We would award the picture to that exhibitor whose bid in our judgment on the terms offered would produce the greatest film rentals. We will not reject any bid for inadequacy and thereafter start the bidding process over again. We will resort to renegotiation, but we will award the picture on the bid submitted in the first instance."

Now, doesn't that suggest to you that the — just a moment, please—that what he was suggesting here was a new arrangement which he proposes to you as a result of your discussions with respect to a split and negotiation after rejection of bids?

* * *

The Witness: My best recollection, sir, that

(5382)

when I went to New York was for one specific purpose. What prompted Mr. Weltner to say what he did, sir, I can't assign, nor can I account for it.

By Mr. Sawyer:

Q. All right.

A. He wrote it. I never said to him to the contrary what he meant by it, but all I can tell you, what my understanding was when I went over there, and that is just the situation.

Q. And therefore this—

A. There was no—

Q. —suggestion of Mr. Weltner with respect to—

A. My arrangement—

Q. —the split—just a minute—to split and renegotiate and whatnot wasn't the subject of your meeting with him that he refers to here?

A. No, sir.

Q. Very well.

A. It was a grievance—

Q. All right.

A. —and he was the man was going to—a new man came in; he wanted me to be happy as a customer, like he does with everybody else throughout the country.

Q. Well, this was, as you say, this was—your testimony is that it was a controversy, if that is what you want to call it,

(5383)

or a grievance totally between you and Paramount?

A. That is right.

Q. Well, what was the general manager of Stanley Warner doing there?

A. General manager?

Q. Yes.

A. Unless he was invited—I don't know.

Q. Well, didn't you just testify—didn't you testify—

A. Well, I say, I—what was he doing there?

Q. Now—

A. He had no—I don't remember him saying anything at this meeting.

Q. He was there, though.

A. Yes, sir.

Q. Was he?

A. Yes, sir.

Q. And if the purpose of this meeting was for you to discuss a grievance that you had with Paramount, why was Harry Kalmine, general manager, there?

A. He could very well have the same grievance that I did. I don't know.

Q. Well, did he?

A. He didn't say anything, not to my recollection.

Q. He didn't say anything?

(5384)

A. Not that I recall; no, sir.

Q. He sat mute during the entire luncheon with respect to pictures?

A. Well, Mr. Sawyer, you are asking me to remember something seven years ago. I don't remember. Listen, in conversation you talk about a lot of things, but what brought him there, maybe he was invited there; maybe he invited himself. I don't know.

Q. Well, I am not questioning, Mr. Goldman, for a moment that he wasn't there without the proper social amenities having been followed.

A. Well, I am sure of that.

* * *

(5387)

Q. Would you, Mr. Goldman, if you can, please listen to the question, and then if you can answer it "Yes" or "No,"—I think most of them you can give me the answer—and I won't deter you from explaining it.

Now, what I have asked you is—and I think you can answer "Yes" or "No" to this: Did you accept the proposition that Mr. Weltner—if you want to read it again; I mean, if you want it up there—

A. I don't want it. Listen, if George Weltner would have called me—

(5388)

Q. See, you don't listen till I am finished.

A. Well—

Q. Did you accept that proposition?

A. I have to bow to your superior interrogation, because I am not a lawyer, but I would like to tell you as a layman. I am just sitting here as a—

Q. Well, as a layman you can answer "Yes" or "No."

The Court: Well, Mr. Goldman, I think that you can answer his question. Did you accept his suggestion? Yes or no, and then give your explanation.

The Witness: I may have called the man up on the telephone.

Mr. Sawyer: Well, you see, Your Honor—he may have called him.

By Mr. Sawyer:

Q. Now, did you accept his propositi or not, or do you not recall?

A. I have got to be redundant. I must tell you, sir, again, my grievance was one thing.

Mr. Sawyer: Your Honor—

The Witness: What George—

The Court: No. I think, Mr. Goldman, you can say that Mr. Weltner made certain suggestions.

The Witness: Yes.

(5389)

The Court: Now you can say you accepted them, rejected them, don't recall whatever was done as to the matter.

The Witness: I don't remember anything about it.

By Mr. Sawyer:

Q. You don't recall anything about it?

A. I don't remember what happened as that—as the result of that letter, sir; no, sir.

Q. All right; now, do you recall that Mr. Hugh Owen —who was Mr. Hugh Owen?

A. Mr. Hugh Owen is the—one of the sales managers, an assistant or a district manager or a—in some capacity in sales.

Q. With what company?

A. Paramount.

Q. And who is Howard Minsky?

A. Howard Minsky was formerly here as district manager. He is presently in New York in a capacity of executive position and I think possibly assistant to Mr. Weltner.

Q. Now, didn't those two gentlemen come down to see you in Philadelphia on Thursday, January 12, with respect to the proposition that Mr. Weltner put to you in this letter?

Mr. Rome: Would you identify the year, Mr. Sawyer?

Mr. Sawyer: 1956.

(5390)

The Witness: Could very well. He has been here on several occasions.

By Mr. Sawyer:

Q. Do you recall that you had a conference with him and that there was also present Mr. George Beattie, who was mentioned here before, and Mr. Schuyler Beattie, who was also of your staff?

A. Could very well been there; yes, sir.

Q. Well, do you recall that? Do you recall there was such a meeting?

A. Well, not that specific meeting. I would say Mr. Hugh Owen has been in Philadelphia on many occasions.

Q. And do you recall that at that—maybe this will refresh your recollection—that at that meeting still another proposal with respect to the split and licensing pictures first run Philadelphia with Paramount was gone into and agreed to?

A. I wouldn't recall that; no, sir.

Q. What?

A. I don't remember.

Q. Do you recall whether or not there was discussion at a meeting, any meeting with Mr. Minsky and Mr. Owen with respect to what the situation would be if Paramount rejected all bids?

A. I wouldn't remember that, sir.

Q. You wouldn't remember that?

(5391)

A. No. He has been here on many occasions. I wouldn't know what was discussed on any of those meetings. I frankly tell you that whenever Mr. Owen ever come to me it was always in a friendly capacity, nothing of any matter of any great moment. I don't—

Q. Well, wasn't it—

A. I don't know what you are referring to.

Q. Wasn't it just a week or two after that, Mr. Goldman, that with the exception of this picture, COUNTRY GIRL, that we don't agree on—and your counsel says TO CATCH A THIEF—wasn't it just a week or so after this date, January 12, 1956, that you commenced bidding on Paramount product? You remember that, don't you, sir?

A. No. I wouldn't. I know we bid on pictures, Paramount pictures.

Q. And that is when you started, wasn't it?

A. I wouldn't say that was the date. We started in that area. But I know, as I said to you before, we were losing so many Paramount pictures that my business judgment was that we made a mistake and we should go back and bid on pictures. We were losing too many of them.

Q. And wasn't that the change in the agreement that was finally agreed to between you—

A. There was no agreement, Mr. Sawyer.

(5392)

Q. —and Howard Minsky?

A. There was no agreement.

Q. Change in your method—

A. No, sir.

Q. —of operation?

A. No, sir; no, sir.

Q. Now, could you tell me what Paramount picture or pictures you lost as a result of not bidding for them?

A. Well, the record will disclose that.

Q. Well, can you think of any?

A. Can I think of any?

Q. Yes.

A. No, sir.

Q. Can you think of a one?

A. Well—

Q. Very well. Now, were there times, Mr. Goldman—and forgetting now what the grievance was you had with Mr. Weltner or with Mr. Owen or with Mr. Minsky—I am just asking you, were there occasions when in bidding first run Philadelphia there were bids from others and those bids were rejected and that the producer—

Mr. Sawyer: Excuse me. Strike that.

By Mr. Sawyer:

Q. —the distributor of the picture then negotiated with you?

(5393)

A. You mean exclusively with us?

Q. Well, you wouldn't know whether it was exclusive or not, would you, necessarily?

A. Well, I assume that—I don't know. State it again. State it—state the question again.

Q. All right. Were there occasions—

A. Yes.

Q. —during this period, and that is toward around the middle of 1954—

A. Yes.

Q. —1955 and up to November, 1956, when bids were submitted for a motion picture by others—and when I say "others," I mean other theaters—that all of those bids were rejected?

A. Yes.

Q. And thereafter the picture was negotiated to one of your theaters?

A. Yes. We did have negotiations after bids were rejected.

Q. Very well.

A. That is right. Yes.

Q. And when you sat down with the distributor, did he indicate to you what the bids of the other people had been?

A. Never.

Q. And did he indicate to you what he thought he ought to get for the picture?

(5394)

A. No, sir.

Q. He did not?

A. No, sir.

Q. Well, did he tell you that he thought the picture should—was of such merit that you should offer such and such?

A. There was never that kind of pressure or influence. It was my own independent judgment when I bid on a picture or if I negotiated on a picture.

Q. Well, did negotiations then just consist of your —would these be done—this would be done personally, would it not?

A. Yes, sir.

Q. This would be done personally?

A. Yes, sir.

Q. Either in their office or your office?

A. On negotiation; yes, sir.

Q. Yes.

A. When they reject a bid, we go over there, and I have heard Mr. Wren say—

Q. All right.

A. —he would wait, and sit there and wait till they come to see him. We extend a different courtesy. We went —we were interested in buying—getting the pictures we could.

Q. And go over there to their office?

A. Absolutely; yes, sir.

(5395)

Q. But on COUNTRY GIRL that arrangement was made in your office?

A. That was in my office; yes, sir.

Q. And sometimes—in fact, on many occasions; and there is nothing wrong with this, Mr. Goldman—but on many occasions the negotiations took place in your offices, did they not?

A. I think so. Yes, sir.

Q. Very well. Now, wherever they took place with the representative of the distributor, would you simply say, "Now, this is what I am willing to give," or did you negotiate back and forth?

A. I had very little of that character of—of procedure myself. If you are referring to COUNTRY GIRL—

Q. No. I am not.

A. —I can tell you about COUNTRY GIRL.

Q. No, not now.

A. Oh, I am sorry.

Q. I am asking you as to the nature of these negotiations and you answered you had very little.

A. That is right.

Q. My question is on those which you participated, did you and the representative distributor bargain back and forth as to what the—

A. Never.

(5396)

Q. Well, how did you do it?

A. How?

Q. Yes. How was it done?

A. Well, in the COUNTRY GIRL I—

Q. No, not in the instance of COUNTRY GIRL, if you don't mind, Mr. Goldman, because that is something we will come to separately. What I want to kn " is that we now have a ' ' uation where all—

A. Yes, on negotiations you would bargain; sure you would.

Q. You would bargain back and forth, wouldn't you?

A. That is right; yes; sure, but never disclosed anybody else's—

Q. Well, what did you think I was asking you when you said you didn't bargain back and forth, that that never happened? Was that some particular instance you had in mind?

A. No. I thought you was talking about COUNTRY GIRL.

Q. Oh. With the exception—that was what you had in mind—COUNTRY GIRL—

A. That is right.

Q. —was the case where you didn't bargain back and forth?

A. That is right.

Q. Now, in other instances you would bargain back and forth, wouldn't you?

A. That is the customary thing.

(5397)

Q. All right; now, when you bargained back and forth, would the distributor suggest to you that he thought that he ought to get so much—

A. Never.

Q. —on such and such a picture?

A. Never.

Q. Well, how could he—

A. That would be telling you what the other fellow would be bidding.

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(5406)

Q. In that situation where, therefore, the bids that were rejected were from other theatres than yours, and you then sat down, whether it was in your office or their office, with the representative of the distributor in question, in that situation did you horse-trade for that picture?

A. No.

Q. Or trade back and forth?

A. Not on negotiation, no, sir.

Q. What did you do then, you simply made an offer?

A. Made a verbal offer.

Q. Is that what you call negotiation?

A. That is right.

Q. Well, doesn't negotiation imply going back and forth between two parties?

A. No, sir. I would think that would be very unfair if they did that to me. Because there would be some manner by which they could indicate to me what the other man was offering.

(5407)

Q. Exactly. And did they not on occasion indicate to you what the minimum national terms were for the picture?

A. Well, that is published, generally known to all the exhibitors.

• • •

Q. Well, weren't you in New York with respect to adjustments where the adjustment would they claim be below the minimum national terms; wasn't that what I understood the problem to be?

(5408)

A. That is right.

Q. And the minimum national terms were then known at the time that you entered into this license agreement, I take it?

A. Yes, sir. Well, yes, pretty generally, yes.

• • •

(5409)

Q. Mr. Goldman, if you simply, in these instances, and when I say these instances I mean other than yours rejected, and you sat down to negotiate—if all you did was to simply then say to the distributor: I will offer so much. And that is all you did, and he didn't say, oh, no, we won't accept that, and you made your offer better, and went back and forth; you didn't do that?

A. I think that is generally the way it is done, yes.

Q. Which way?

A. The way you describe.

Q. You mean you would go back and forth?

A. Oh, no.

Q. No. That is only when nobody else wants it?

A. That is it.

Q. And if bids are rejected of others you don't go back and

(5410)

forth, is that right, you just simply say: All right, I will offer X or XYZ.

A. That is right.

Q. If that is all you were going to do, what is the point of going to see him personally? I mean if he just sits there and receives this, why is that negotiated?

A. I don't know, it could be a telephone call, you could go to see him, he would come to see me.

Q. You could write him a little note, couldn't you, or write him a little letter to that effect?

A. I don't know.

Q. You say you don't know whether you could or you don't know whether you did or not?

A. Well, I suppose it would be perfectly all right to write him a note, but I don't recall any notes being in writing. Negotiation could be done in many ways. You could do it on the telephone. You could go visit the man. He could come visit you.

Q. What is the purpose of having a face-to-face meeting, Mr. Goldman, if all you are going to do in this situation is merely state to him an offer, just like flat like that?

A. Well, what you are saying is rebid the picture. Now, that has happened, rebid the picture, which means a signed bid, it is enclosed in an envelope and it is opened by the

(5411)

New York people.

Q. Yes, but my question—

A. And the negotiation is not that. It is purely verbal.

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(5412)

Q. Mr. Goldman, I am not asking you what the exhibitor could do or about having seen the picture, I am trying to ask you what conceivable purpose is there in having a face-to-face meeting if you are simply going to communicate a flat offer, and there will be no bargaining? That is what I would like you to answer.

A. If a distributor called me up after bids were rejected and he got into a controversy such as you indicated, I would regard that as suspicious.

Q. A controversy such as I indicated?

A. Yes, sir. That he would start to bargain with me on a negotiation. I think he would disclose by some manner or means what the other man bid.

Q. That would be unfair, wouldn't it?

A. Not fair. Well, I wouldn't do it.
Q. Wouldn't you consider it unfair?
A. Wouldn't I consider it unfair?
Q. Yes.

(5413)

A. Well, if it was done to me I would consider it unfair.
Q. All right.
A. And I don't think that is—
Q. Would you consider it unfair to anyone else?
A. And that is not the practice.

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(5470)

The Court: Mr. Sawyer, I know in your brief that you do not treat the different defendants in any different manner. Of course, I am going to consider your contention primarily that the motion should not be granted as to any defendant. However, at this point, I would like to request if I may that you let me have a brief by Tuesday morning as to what you think you have proved so far and in effect what you believe you will be able to prove in the future as to United Artists, RKO, Universal and Fox Philadelphia. In other words, as to those four, I would like to know what you contend that you have established so far and in effect an offer of proof as to what you believe you will be able to establish in the future to warrant bringing in those four defendants in the case. Do you understand?

(5504)

THIRTY-SECOND DAY

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(5506)

WILLIAM GOLDMAN, recalled.

DIRECT EXAMINATION (continued)

By Mr. Sawyer:

Q. Mr. Goldman, at the close yesterday we were talking about the situation in which you had a conference or conferred with the representative of the distributor.

A. I didn't get that.

Q. We were talking about the situation which exists when you sit down with a representative of the distributor to negotiate in an instance where there have been other bids, prior bids, which have been rejected; that was our subject.

Now, I believe that you stated that in that situation there isn't a bargaining back and forth, that you simply make what I think you called an offer, is that right?

A. Yes, sir.

Q. What do you include in that offer?

A. Well, what is customary is the availability, when you will play the picture; where will you play the picture. And terms, which are important. It could be a 90/10 deal, the way it was described to the Judge, or whatever the term may be. A sliding scale. It could be various things.

Q. You don't include advertising, do you?

(5507)

A. I am not sure that that is always a part of it. I am sure that on occasion there has been, yes.

Q. Well, generally in your license agreements there is no provision with respect to advertising, is there?

A. Sometimes there is, yes.

Q. And sometimes there is not?

A. That is right.

Q. Now, when you bid over a house allowance what figure do you use for the Midtown?

A. For which?

Q. For your house allowance for the Midtown.

A. I think $5000.

Q. Is that $5000 in round figures, even?

A. Yes.

Q. What figure do you use for the Goldman?

A. It may be around $6000 or more. I don't know.

Q. And for the Randolph?

A. $7500.

Q. And those figures are all round figures, are they?

A. Yes, sir.

Q. Do you consider those to be just bidding figures?

A. Yes.

Q. And you do not consider that the exact expense of a week of a theatre at that particular time would exactly come out to

(5508)

$5000, do you?

A. No. The house allowance as we figure it, yes.

Q. But I don't think that quite answers the question. You do not consider, do you, that the exact expenses of the operation in any one of those theaters for a given week would come out to precisely that figure?

A. No, the expenses vary in the theaters, Mr. Sawyer.

Q. Is that an approximation of your weekly expenses?

A. That is an approximation, yes, sir.

Q. Now I believe you stated yesterday at page 5369 that you did bid on COUNTRY GIRL.

A. Yes, sir.

Q. And I asked you if you hadn't stated to the contrary on an earlier occasion?

A. To the contrary?

Q. I read to you from your deposition, page 4 of your deposition, with reference to COUNTRY GIRL:

"Q. So you didn't bid on that picture; you negotiated that with Minsky?

"A. Yes. I don't recall. I don't know what was done. My recollection is we did not bid on the picture."

And then you were asked this question—well, let us stop there and let me ask you this: At the time—

* * *

(5509)

Q. Now, at the time of the discussions with Mr. Minsky on

(5510)

COUNTRY GIRL in your office did you know that there had been prior bidding on that picture?

A. Prior bidding by our company?

Q. No, by anybody.

A. No, I don't recall any. I know the picture was offered. I don't know just what took place with other people or what the bids were.

* * *

Q. Not what the bids were, but when you sat down with Howard Minsky of Paramount did you know that there had been prior bids?

A. Yes, sir, because it had been rejected I assume that there had been prior bidding on it.

Q. Well, did he say that there had been prior bidding and that the bids were rejected?

A. Yes, sir, I knew that.

Q. That he was coming to you to see what your offer was?

A. I don't know if Minsky told me. I know in a general way that the bids had been rejected.

Q. Now, you testified to the contrary to that on this deposition, did you not, Mr. Goldman?

(5511)

A. I don't recall.

Q. Well, I read you now—this is the next question and answer:

"Q. Did you know whether there had been any bidding on that picture before this negotiation you had with Mr. Minsky?

"A. No, I didn't."

Did you so testify?

A. Well, all I knew is that I later knew that the bids had been rejected.

Q. Well, you later knew, but not later than this deposition I take it; this deposition was taken in 1958. You don't mean later than this, do you?

A. Well, maybe my recollection is refreshed here, Mr. Sawyer.

Q. But you now state that at that time you knew that there had been prior bids and that they had been rejected?

A. Yes, sir.

Mr. Sawyer: Now we are coming to the rest of this, Mr. Rome, if you want to read the top part, if I don't read all I should you will have an opportunity.

This is COUNTRY GIRL now.

Mr. Rome: Thank you.

By Mr. Sawyer:

Q. COUNTRY GIRL originally was on the Stanley Warner side of

(5512)

the split, was it not?

A. It may have been.

* * *

(5519)

Q. Now, Mr. Goldman, did you not have a discussion with Mr. Nat Fellman with regard to transferring COUNTRY GIRL from the Stanley Warner split to yours?

A. I don't think I would. It probably would be Mr. Beattie.

Q. All right. But someone in the Goldman organization did discuss with Mr. Fellman the transfer of COUNTRY GIRL to Goldman as opposed to the Stanley Warner side of the split?

A. It could very well have been.

(5520)

Q. And that was a—well, strike that.

What was the first action that the Goldman organization or you personally took with respect to COUNTRY GIRL? What was the first thing you did about it after it was shifted to your side of the split?

A. Well, since I have heard the discussion here in the court and I have had an opportunity to refresh my recollection about the first, as you described it—the first time I ever concerned myself with a picture?

Q. Yes.

A. In reading or hearing the discussions, as I recall, I made or called up Ulrik Smith and made and oral offer and I think my oral offer was late and it was rejected. And subsequently when the bids were—

Q. Well, now, just on that point, I don't want to interrupt you, but on that point, do you know—when you say you think it was rejected, were you so informed?

A. I recall something that it was rejected only because my oral offer was late. I don't know whether that was in writing or whether it was a phone call, but I vaguely recall that because my oral offer was late.

Q. Yes? Then what happened?

A. Then, subsequently, the picture was rebid.

Q. It was rebid?

(5521)

A. I mean not rebid, but negotiated. I am sorry.

Q. Negotiated?

A. Yes, sir.

Q. To you?

A. To me?

Q. Yes.

A. Well, Mr. Minsky called on me at my office, yes, sir.

Q. He came around to your office, did he?

A. Yes, sir.

Q. Was that without any prior solicitation from you or telephone calls, other than this oral offer that you say you made?

A. I don't know as I had any conversation with him prior to that, no, sir.

Q. He arrived, and what did he say?

A. He said they were interested to negotiate for COUNTRY GIRL.

Q. And what did you do?

A. Well, Mr. Beattie of course wasn't there. Ordinarily he would handle a transaction like that.

Well, I must say parenthetically that I never get into a situation where I contract for pictures myself, but I have been friends of the Kelly family for many, many years and—

(5522)

Q. Well, now, Mr. Goldman—

A. Well, I think—

Q. —I don't think that is really relevant.

A. Well, I would like to tell you why I particularly concerned myself with this particular picture.

Q. There is nothing wrong with your having concerned yourself with it and I am not cross-examining you about whether you did or why you did. I am just asking

you if you will tell me when Mr. Howard Minsky just arrived at your office—

A. Yes, sir.

Q. and he said to you, "Let's negotiate for COUNTRY GIRL,"—

A. That's right.

Q. —now what did you do then? What happened? What did you say and what did he say?

A. I wrote out an offer for the picture; a scratch pad on my desk, and I wrote out an offer for $75,000. And the thing that he was concerned about was the play date.

Q. Just a minute. The $75,000 was—

A. For the Midtown.

Q. —a guarantee?

A. A guarantee of $75,000.

Q. Was that the only guarantee you ever put up for any

(5523)

picture during the period of this suit?

A. It could very well have been, yes.

Q. It is, isn't it?

A. Beg your pardon?

Q. It is the only one, isn't it?

A. Yes, sir, I think so.

Q. Now, did you know at that time that—your guarantee was $75,000, was it not?

A. That's right.

Q. Did you know at that time that the best guarantee then extant from the other theatres was also exactly $75,000.

A. No, sir.

Q. You didn't know that?

A. No, sir.

• • •

(5524)

Q. Now, did you know at that time that the Viking had offered 90 per cent over a house figure of $4900?

A. No, sir.

Q. What percentage terms did you offer?

A. 90 per cent; 90/10 deal.

Q. Yes. Over what?

A. Over $5000.

Q. Did you give a play date?

A. I may have. I think so, yes, sir.

Q. Well, I will show you this. This is not to test your recollection on it. This is P-23.

A. I am pretty sure; a play date, yes, because that was an important thing.

Q. Yes. Is that piece of paper there your offer or bid, or whatever you want to call it, on COUNTRY GIRL?

A. Yes, sir. This is starting on or about.

Q. Yes.

A. Yes.

Q. What? Or on about what?

A. February 9.

Q. February 9?

(5525)

A. Yes.

Q. Did you start it on or about February 9?

A. No, sir.

Q. When did you play it?

A. Well, just as I heard recited here, in advance of that.

Q. Well, what date was it, do you recall?

A. Just as I heard them say, February 1st.

Q. The 1st of February, was it not?

A. Sure, yes, sir.

Q. Now, Paramount has a form, do they not, on which exhibitors interested in licensing their pictures are to make their bids or offers?

A. When you bid for a picture, yes, sir.

Q. And that form includes a great deal of information above and beyond what you have on here, doesn't it?

A. Well, I am sorry now, you have got to distinguish—there is no use making any mystery out of this thing.

Q. I am not making any mystery.

A. I think you are.

Q. Doesn't it ask for considerably more information?

A. Not on an offer, Mr. Sawyer.

Q. Well, on the form, the Paramount form for bid or offer.

A. If you bid, yes, there is a form. And when we bid on a picture we write on our own stationery, so we don't—

(5526)

Q. This Paramount form isn't just for a bid, is it?

A. Beg your pardon?

Q. Is it your testimony that this Paramount form that we are speaking of is just for a bid?

A. As I recall it, yes, sir.

Q. And not to be used for offers?

A. Well, somebody could use it for offers. We don't.

Q. Well, I will show you one, Mr. Goldman, for COUNTRY GIRL.

Mr. Sawyer: I ask to have this marked P-191.

(Photostatic copy of Paramount Request For Offer was marked Exhibit P-191 for identification.)

By Mr. Sawyer:

Q. Now will you read the heading at the top, please.

A. "Request For Offer."

Q. Request For Offer?

A. Yes, sir.

Q. It doesn't just say bid, does it?

A. Well, this is a bid form.

Q. Well, doesn't it pertain to an offer, then, as well as a bid? Doesn't Paramount ask the interested exhibitor to give considerable information more than you have on this?

A. I tried to say to you, sir, that the form that you just showed me is the regular form in which an exhibitor in the initial stages is interested in the picture submits a bid.

(5527)

Q. It is a bid but Paramount calls it an offer?

A. I don't know what—it doesn't make any difference to me what they mean. I know what we do as a matter of practice.

Q. Do you distinguish, Mr. Goldman, between a bid and an offer?

A. Yes, sir.

Q. What is the difference?

A. Well, a bid is precisely this: The theatre you play it at, the terms, the date. And if there is other things, I just can't recall for the moment.

An offer is verbal, it could be a phone call, but it is not anything that has to be precise as a bid.

A bid has a time: 12:00 o'clock, 5:00 o'clock; a date. But an offer for a negotiation has no time limit on it at all.

Q. Do you mean a time limit when it has to be in? Is that what you mean by time limit?

A. I mean a time limit, yes, as to when they are going to make a decision. But a bid has that. That is very definite.

Q. Well, now, you said that first of all you distinguish because you said a bid has in its terms, the theatre which it is to be played and the opening date?

A. The time, the opening date, when you play the picture.

Q. But when you made these offers you speak of and these

(5528)

negotiations, you didn't give this information to the distributor; the theatre, the—

A. Yes, verbally you would, yes, but there is no time.

Q. Just let me stay with this for a moment.

A. I know, but—

Q. Those four features that you mentioned, then, are common to both bid and offer, are they; the theatre—

A. Well, I am still trying to distinguish between a bid and an offer.

Q. Yes, I know we are.

A. There is a great distinction, as I said yesterday. I tried to show you the mechanics of it.

Q. Well, would you point out, Mr. Goldman, the distinction if it is other than whether or not it is written or oral? Is that the distinction?

A. Well, it doesn't necessarily have to be oral. A man could write an offer if he wanted to or negotiation.

Q. How would you distinguish between a written offer and a written bid?

A. Well, as we make a bid it is in writing, sir, and it complies with the things that I have recited; the theatre you would play it.

Q. All right. Now here are the things that a bid has: The theatre at which it will be played, right?

(5529)

A. That's right.

Q. Now what is the next one?

A. The terms.

Q. The terms. That means the percentage?

A. That's right.

Q. Very well. What else?

A. And availability. We would say "on or about" which gives us some flexibility if the distributor decides he wants to change it or we want to change it.

Q. When you say "on or about availability," that gives you some flexibility?

A. "On or about" means that—

Q. How much time?

A. Beg your pardon?

Q. Let me stay with that for a minute. How much flexibility did that give you?

A. That is entirely up to the discretion of the distributor.

Q. Does it leave you discretion, too?

A. No, sir.

Q. It doesn't leave you any?

A. No, sir.

Q. In other words, when you say "on or about availability" it gives the distributor discretion but it doesn't give you any?

(5530)

A. Outside of your discretion in the instance of Paramount. They thought it was to their advantage, knowing that they found out or discovered—

* * *

A. Paramount for the first time, Mr. Sawyer,—they never did telecast a nomination. They now telecast only the awards. Paramount discovered that they were going to have the nominations telecast and they decided it was infinitely to their advantage to have this exposure on television, and then there was the discretion, as I just indicated, where they thought it was infinitely to their advantage to play the picture in advance of the 9th.

By Mr. Sawyer:

Q. But Paramount—

A. But the picture was on the screen on the date that they had prescribed, on the 9th.

* * *

(5531)

Q. Mr. Goldman, let me ask you this question, because I don't think it was answered. You have testified that when you say "on or about availability"—

A. Yes, sir.

Q. —that that gives the distributor some discretion.

A. In the exercise of his independent judgment, yes, sir.

Q. But it doesn't give the exhibitor you say any discretion in moving it?

A. With only his permission, yes, sir.

Q. All right, then he has no discretion on his own?

A. Beg your pardon?

Q. The exhibitor by himself can't then change the date on which he plays the picture?

A. With his request, sometimes it is acceded to, yes, sir.

Q. He can't do it on his own, can he, without the permission of the distributor?

A. I don't know as I have ever done it myself. I don't know.

(5532)

Q. You have not?

A. I wouldn't say that I have or haven't.

Q. Well, would you assert that you have not changed availabilities on your own without consulting a distributor?

A. I wouldn't know, sir.

* * *

Q. You have cited three things, Mr. Goldman, that you say are features of a bid: The theatre in which you will play.

A. Yes.

Q. That the bid contains the terms and it contains availability.

(5533)

Now, is there any other distinguishing feature of a bid?

A. Well, I think those are the prime things. There may be others, but as it occurs to me right now those are the essential ones.

Q. Now, what does an offer contain as opposed to what you say a bid contains?

A. Well, an offer is essentially the same thing, about the same thing.

Q. It is the same thing.

A. But it gives you more latitude to trade.

Q. Just a minute. Does it contain the theatre in which the picture will play?

A. That is a thing that you discuss, where you want it. In a bid you say a particular theatre. In a negotiation you can talk of other theatres.

Q. Well, Mr. Goldman, I am now asking you the difference between a bid and an offer.

A. I am trying to describe the mechanics of it.

Q. When you make offers, don't you tell the distributor what theatre you are going to play it in?

A. He may say, "I want another theatre."

Q. Not what he says, Mr. Goldman. Do you make an offer telling him what theatre?

(5534)

A. Yes, but my first offer may not be acceptable to him. He will say, "Well, can I have the other theatre?"

Q. Oh, then, you are bargaining back and forth on it on these negotiations?

A. That is his privilege, yes, sir.

Q. Well, you are bargaining back and forth?

A. You have a discussion, certainly.

Q. Is that true on terms, too?

A. Sir?

Q. Is that true on terms?

A. I think that may apply to terms as well.

Q. Now do you want to change your testimony that you don't bargain, that you simply make a flat offer when you go in on these pictures?

A. I would say initially we make a flat offer. Now, whether he elects to say, "Well, I think I ought to have better terms"—

Q. Oh, well, I thought you said yesterday that if that happens—understand now we are talking about the situation where the bids have been rejected; you are not negotiating.

A. No, sir, Mr. Sawyer, there is no use making a mystery out of this, sir. I can tell you that a distributor if he is not satisfied with the terms, yes, he will say, "I don't think we ought to get 40 per cent, I think we should get 50

(5535)

per cent."

Q. Very well. Now I understand that when bids have been rejected and the distributor comes to you and you are negotiating, that you make an offer as to the theatre and he may say, "Well, now, I think it ought to be different theatre."

A. That could very well be.

Q. And you may say, "Well, I will offer you 90/10 over a house nut." He says, "No, I think you ought to give me 50 per cent on this picture."

A. That could happen.

Q. And you say, "I will play it on availability on such-and-such a time," and he will say, "No, I want it a little earlier."

A. On the other hand, he may say, "I want this theatre. Are you offering the theatre on terms?" And he will report back to his people and the probabilities are it will be accepted. There is no fixed formula.

Q. And he will say—for instance, you will say, "Well, I will offer you 50 per cent the first week, 40 per cent the

second week, 35 per cent the third week." Suppose that is your offer. You have made offers like that, haven't you?

A. Well, I haven't. Mr. Beattie has.

• • •

(5537)

Q. Now, can we come back, Mr. Goldman, to this difference between a bid and an offer?

You now tell me I understand that when this negotiation takes place after these rejections of bids, and on the various features of the offer that you are making, that there are various discussions back and forth between you?

A. Could be, yes, sir.

Q. Yes. For instance, as I said, you may make an offer for certain percentage terms to the distributor and may he not say, "Well, I think you ought to give me 50 per cent for the first three weeks, not just for the first week?"

A. That could very well happen, yes.

Q. Didn't you say yesterday that you thought that that

(5538)

would be unfair if negotiations were carried on that way—don't answer, please, until I finish—because it would be inevitable that in such a process the distributor would reveal by his demands what others had bid?

A. Yes, sir, I say there could be, if an exhibitor was astute sometimes, and there may be a construction by which you could construe a bid he may have had in mind from somebody else. But that doesn't necessarily follow. I am not a suspicious person. I don't suspect--

Q. You so testified, didn't you, yesterday?

A. Well, I say it could very well happen.

Q. All right. Page 5397:

"Q. All right; now, when you bargained back and forth, would the distributor suggest to you that he thought he ought to get so much—

"A. Never.

"Q. —on such-and-such a picture?"

A. Read that again.

Q. "A. Never."

A. No, the first one.

Q. "All right; now, when you bargain back and forth, would the distributor suggest to you that he thought he ought to get so much—

"A. Never.

(5539)

"Q. —on such-and-such a picture?

"A. Never."

Now, are you changing that, Mr. Goldman?

A. I am not changing it at all. I tried to explain to you the mechanics of it.

• • •

(5548)

Q. Oh, well, are there any guarantees ever offered by you for any motion picture during the period of suit other than COUNTRY GIRL?

A. After I was losing a lot of pictures, yes, sir; I changed

(5549)

my independent—I took an entirely different hard look at—

Q. All right.

A. —what I was doing as an independent business judgment and I decided I had to bid. I was losing all of my pictures.

Q. No, not bid—not bid.

A. Well, I — you asked me about bid.

Q. The guarantee, Mr. Goldman.

A. Guarantees?

Q. Yes.

A. It may have well been; yes.

Q. Well, did you ever guarantee, put up a guarantee on any motion picture from July 2, 1954, to November 11,—

A. I wouldn't—

Q. —1956, on any motion picture other than COUNTRY GIRL?

A. I think the records would have to be shown to me. I wouldn't know.

Q. Well, you don't know of any, do you?

A. Mr. Beattie, of course, could answer that question.

Q. All right.

A. He is a witness here.

Q. You don't know of any, do you?

A. I beg your pardon?

Q. You don't know of any?

A. It could very well have been. I don't know.

• • •

(5550)

Q. Just then, Mr. Goldman, you said you were losing pictures by not bidding. I am not talking about guarantees, but you brought in bidding; right?

A. That is right.

Q. And didn't I ask you yesterday to name me one—this is in Paramount—one Paramount picture that you ever lost because you didn't bid.

A. I wouldn't recall any particular picture.

Q. Well, do you recall any since then?

A. No, sir.

Q. Could you think of a single one?

(5551)

A. No, sir.

Q. Can you think of any picture that you lost on that basis?

A. Generally, I am talking about now, our policy was not to bid on pictures. It could be anybody. We lost a great many pictures.

Q. Well, now, you will tell me what some of them were and the result of that?

A. I can't recall any picture by name.

Q. You can't recall a single one?

A. There were many pictures. My goodness, there is several hundred pictures made a year. I couldn't recall. You asked me about ROMEO AND JULIET. I swear I couldn't tell you what company made it.

Q. Well, there were several hundred made a year, but you tell me that you were taking such a licking by this policy that you changed it?

A. That is right.

Q. And I take it you mean you changed it after—that you changed it in February of 1956 with respect to Paramount?

A. I can't fix the date, sir, but I know that we changed our policy.

Q. You never changed it with respect to United Artists, did you?

A. I don't know, sir.

(5552)

Q. You never changed it with respect to Universal, did you?

A. I wouldn't be able to tell you what company or the date, but I know that we did change it from not bidding on pictures, you understand, and changed, and then we subsequently went into bidding.

Q. Yes; and it is after the period of suit you are speaking of?

A. I don't remember what time it was.

Q. All right; now, because this was so harmful to you, you couldn't take it, so to speak—

A. Not couldn't take.

Q. —the pictures you were losing?

A. No. That wasn't it at all.

Q. Well, I don't mean that in an insidious sense.

A. Well, it was—

Q. This was a matter that was hurting you in your business you told us; is that right?

A. Yes. I was losing pictures.

Q. And you can't remember a single picture that you ever lost?

A. I—that is not a thing that I am personally involved in with respect to the physical handling. That is Mr. Beattie's department. He will be the next witness and he

(5553)

can tell you accurately and answer your questions as you want them.

Q. But you, yourself, president of the corporation, you cannot remember; you yourself, you cannot remember any such picture?

A. Not any particular picture.

Q. All right.

A. No, sir.

Q. By the way, Mr. Goldman, just to come back for one minute, do you remember we were talking about the difference between bids and offers and offers and negotiations?

A. Yes.

Q. And one of the things you said about a bid was a bid had to be in at a specific time?

A. Well, a film company will give you a date—

Q. Deadline.

A. —a time,—

Q. and lots of time—when I say "lots of"—there has been occasions when they will change it. I understand that.

A. Yes.

Q. I am not going to get into that. I am just asking you, is it typical of a bid that it has to be in before 5:00 o'clock, shall we say, on a certain date?

(5554)

A. That is usually the case; yes, sir.

Q. And when, for instance, it says in an invitation to bid that the bid should be in before 5:00 o'clock on a given date, would you deem it in adequate time to comply with that if you got your bid there a half an hour before 5:00 o'clock in the afternoon?

A. In adequate time?

Q. Yes. Would that be—that would comply with what the man asked for—

A. Yes, sir.

Q. —wouldn't it?

A. Yes, sir.

Q. I mean, if the bid said to be in at 5:00 o'clock on a given day and you arrived with your bid at 4:30, shall we say, 4:30—

A. Yes.

Q. —that day,—

Q. —you would consider that you were on time, would you not?

A. Yes, sir.

Q. In fact, isn't it customary to put bids in or rather on close to the deadline rather than several days ahead?

A. You do that. Sometimes you mail them.

(5555)

Q. Well, I mean if you are going to take them there.

A. If you are going to take them there?

Q. Yes.

A. I wouldn't say get there at 4:00 o'clock or 4:30, but you get there sometimes ahead of the—

Q. Before 5:00 o'clock?

A. Before 5:00 o'clock.

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(5559)

Q. Mr. Goldman, again with respect to COUNTRY GIRL, after you gave this to Howard Minsky, did that close the deal for COUNTRY GIRL?

A. No, sir.

Q. Isn't it true that Mr. Minsky told you then that you had the picture?

A. No, sir.

Q. One other thing I would ask. This is dated January 17, 1955; is that correct?

A. If that is what it says, yes, sir.

Q. And then the notation at the bottom appears to be 1/18/55.

A. Sir?

Q. (Handing). All right. You don't know about that.

A. No.

Q. What time of day was it that this negotiation took place?

A. Well, I can't fix the time. I know it was in the afternoon.

Q. Do you know the day on which the bids were—the second round of bids were due on COUNTRY GIRL?

(5560)

A. When they were due?

Q. Yes.

A. No, I don't recall.

Q. Would you say, Mr. Goldman, that the Mastbaum Theatre, from the standpoint of size—strike that.

Would you say that from the standpoint of size the Viking Theatre was much more favorable physically than the Mastbaum?

A. Much more physically favorable?

Q. Yes.

A. No, sir.

Q. You wouldn't say that?

A. The Viking is a nice theatre. I am not attempting to deride it.

Q. No, no. I am asking from the standpoint of size.

A. Size?

Q. Yes.

A. As compared with the Mastbaum.

Well, when the Mastbaum was first built it was designed for an entirely different thing. Subsequently, as the business changed—it was intended for big stage shows and motion pictures.

Q. And would you say, Mr. Goldman, from the standpoint of size the Viking is much more favorable than the Mastbaum?

(5561)

Mr. Wolf: Objected to. I do not know what much more favorable with respect to that question means.

The Court: Sustained.

Mr. Sawyer: Well, I will ask the witness, if I may, what he meant by his answer that he gave.

By Mr. Sawyer:

Q. The questions is: Haven't you been of the opinion —this is the deposition 112.

"Q. Haven't you been of the opinion for a number of years that the Mastbaum has been much too large for efficient, profitable operation?

"A. Oh, yes.

"Q. And over how long a period?

"A. From the standpoint of size I would say the Viking is much more favorable physically in that aspect, yes."

A. Well, I tried to tell you that the theatre was designed for a particular type of show.

* * *

(5562)

Q. My point is, Mr. Goldman, that when you made that answer, you are the one who said the Viking is much more favorable physically than the Mastbaum; now you presumably knew what you meant by that answer, is that correct?

A. Well, there are a lot of physical parts of the Mastbaum Theatre which can't be applied to the present-day operation. There is a big stage and there are things of that character.

Q. And the Viking is more favorable in that respect?

A. Well, it hasn't — yes, I think the Viking is a nice theatre. I am not attempting to say anything different.

Mr. Sawyer: Now, Your Honor—

The Witness: I was in it.

By Mr. Sawyer:

Q. In your deposition you said it was more favorable than the Mastbaum from the standpoint of size.

A. Well, I think you have to come to some conclusion as to what it has in its favor and what is against it.

Q. What did you mean when you said here in your deposition:

"I would say"—I am quoting—"the Viking is much more favorable physically in that aspect, yes."

What did you mean?

A. Well, that could take a lot of things into consideration;

(5563)

for instance, the Mastbaum Theatre has to have a big stage crew, it has to have probably more operators; it takes more people to run the theatre, to man the theatre. It could cover many things.

Q. Is that what you meant when you said this?

A. Well, it could have meant many things. Of course, I didn't answer in detail as you are asking me now.

Q. Well, you just stated that as a conclusion in your deposition, didn't you?

A. I beg your pardon?

Q. You stated that as a conclusion in your deposition, without the explanation, is that correct?

A. I understand.

Mr. Wolf: Well, I object to that. That is purely a hypothetical question.

By Mr. Sawyer:

Q. Now, you have never bid competitively against the Fox, have you?

A. Against the Fox?

Q. The Fox, yes.

A. I wouldn't know. Mr. Beattie would have to answer that.

Q. Well, do you recall that you did or did not? What is your recollection on it?

A. I have no recollection.

(5564)

Q. You have none.

And at the time of your deposition didn't you have a recollection that you did or didn't?

A. I could very well have said that I did or didn't. I wouldn't know, sir.

Q. I read you page 112:

"Q. You have never competitively bid against the Fox?

"A. I don't recall that we did, no."

Is that correct?

A. Well, I say the same thing today.

Q. All right. You can't think of a motion picture, for instance, can you?

A. No, sir.

* * *

CROSS-EXAMINATION

By Mr. Rome:

Q. Mr. Goldman, how many years have you been in the motion picture industry?

* * *

(5565)

The Witness: November the 21st of this year I will have been an exhibitor for 50 years.

* * *

(5567)

Q. The name of George Beattie has been mentioned here, Mr. Goldman. What is his function and duty with your company?

A. He is the man that buys and books the pictures. Contracts for them.

Q. Sir?

A. And contracts for them.

Q. Who is it who conducts the negotiations with the distributors who are responsible to their invitations to bid?

A. Mr. Beattie.

Q. What other departments are there within your company in so far as the motion picture operation is concerned?

A. Well, aside from the buying of the pictures, the booking department, the publicity, maintenance department, the group sales, to stimulate sales on motion pictures.

Q. What are group sales, Mr. Goldman?

A. Well, I can best describe that by what occurred just recently. RAISIN IN THE SUN was a very important picture. It was a difficult picture to communicate to the public—

* * *

(5568)

A. (Continuing) Well, because of its character, and if you want to obtain the best results for the picture, in the final analysis the distributor has an interest in every picture we exhibit, we want it to be successful, we want to resort to every skill that we know of in the business.

So a department such as the group sales would go to various organizations; they would tell them about the motion picture; they would arrange for screenings for them. They did everything so that it would have the kind of saturation, so that if there was interest in the picture, for instance, organizations would buy a house for that particular day, or a number of tickets, and in that way it stimulates the gross of the picture, and the word-of-mouth as a result of it has a great value on the picture in subsequent days.

By Mr. Rome:

(5569)

Q. Now, how many screenings are held, to your knowledge, by your organization, you or your representatives, during the course of a week?

A. Well, we screen practically every day. The fact is when I leave here at 4:30 o'clock I screen pictures, because I can't catch up with it; and then we have also—

Q. What is the purpose of screening, Mr. Goldman?

A. Well, the purpose of screening is to get an idea of what the picture is, to try to evaluate it, also from the standpoint of how you would merchandise it, how you would excite the public to want to come in to see it.

Q. Has it anything to do with the advertising campaign that may be followed?

A. Tremendously.

Q. Now, it has been mentioned here that you personally discussed with Mr. Howard Minsky of Paramount the film THE COUNTRY GIRL. How did that come about that you personally did that rather than Mr. Beattie?

A. Well, I have tried to explain, and Mr. Sawyer stopped me. I have known Jack Kelly—

(5570)

* * *

The Witness: I have known the Kelly family as long as I have been in Philadelphia. I have known

Jack Kelly. I knew Gracie Kelly since she was a youngster. I visited the Kelly's home, they visited mine.

Jack had always consulted me about Grace. I was interested to see that she had the benefit of my knowledge and information. She would ask me to look at her television shows.

Mr. Sawyer: Your Honor, I object to this.

The Witness: Well, I would like to tell you.

Mr. Sawyer: This is totally irrelevant to this case.

The Court: I think he has gone into it enough, has he not, he has shown a close association with Mr. Kelly and his daughter.

The Witness: And then—

By Mr. Rome:

Q. What was your own particular interest in so far as COUNTRY GIRL was concerned?

A. Well, as I saw COUNTRY GIRL, and I have seen Gracie's pictures in previous releases, and having my own judgment, I thought that this was a picture by which, if she was

nominated, that could very well be the picture that would get the award.

I tried to get TO CATCH A THIEF because, my only interest in that was because I wanted to play a Kelly picture.

Q. And what did that lead you to do because of your evaluation of the film and your interest in Grace Kelly?

A. Well, I made a—when the picture was offered again for bidding I bid for the picture.

Q. Now, had you had anything to do in submitting an offer or proposal on the picture? Earlier you testified that you made an oral offer.

A. Yes, I did, I called up—

Q. Excuse me. Do you recall the terms of your earlier oral offer?

A. My offer orally to Ulrik Smith was exactly the same thing in terms of money, and I don't remember anything other than that.

(5572)

Q. And do you recall the amount of the money?

A. $75,000, and the terms of $5,000 for the theater.

Q. $75,000 was—

A. $75,000 was the guarantee and $5000 for the overhead.

Q. Now, there has been testimony about the fact that the film opened on February 1 rather than on February 9. What in your opinion was the result of being able to open the film on February 1st.

A. Well, I think the records of the gross of the theater would indicate the wise judgment Paramount made in asking us to play the picture, requesting it to play in advance of that, because the grosses on the opening week, which is always the outstanding gross, resulted in the second and third week being almost comparable.

Q. If I bring now to your attention the fact that the first week's gross on COUNTRY GIRL was $33,000 and the second week's gross was $28,000 and the third week's gross was $29,000, would that be in accord with your own recollection of how the film performed?

A. Well, I said that they were comparable, because of the stimulation and the exposure of this telecast, which was the nominee, which occurred prior to the 9th of February.

Q. Would you know who it was conducted discussions with the distributor concerning the specific date on which the film

(5573)

opened?

A. Do you mean with respect to my bid?

Q. No, with regard to opening on February 1st.

A. I don't recall. Probably Mr. Beattie.

Q. Now, there has been reference to whether or not the proposal that you submitted on COUNTRY GIRL was an offer, a bid or a negotiation. Have you any recollection of anything that happened following the award of the film to your Midtown Theatre in so far as your proposal on the picture was concerned, the $75,000 guarantee and the other terms that you have mentioned?

A. Do you mean as to when the award was made?

Q. No, no. Not as to when the award was made. Was there thereafter any discussion or question raised with regard to the bid that you had submitted?

A. Yes, sir. They were very positive and definite on the date the picture would be made available, for when we would play it.

Mr. Rome: May I ask that this document, sir, be marked with the defendants' next number.

(Photostatic copy of telegram bearing date January 25, to Al Schwalberg from William Goldman, was marked Exhibit D-82 (Goldman) for identification.)

By Mr. Rome:

Q. Mr. Goldman, I hand you a document which has been marked D-82 and ask you if you can read it and identify it, sir.

(5574)

A. Yes, sir, I can.

Q. What is that document?

A. Well, this is a telegram from Mr. Schwalberg asking me for my permission or authority—

Q. Would you look at it carefully, sir.

A. Sir?

Q. Is it from Mr. Schwalberg or to Mr. Schwalberg?

A. Oh, I am sorry. I am sorry, this is addressed to Mr. Schwalberg. This is Al Schwalberg, Paramount Pictures.

Can I read it?

Q. Yes, would you read it, sir.

A. Yes, sir.

Q. From whom does it come?

A. This comes from Paramount Pictures.

Q. I don't think you have read it, sir.

A. Sir?

This is from me.

Q. Yes.

A. Yes, I see.

Q. From you to Mr. Schwalberg?

A. Addressed to Paramount Pictures, yes.

Q. Right.

A. This is from me to Paramount Pictures addressed to Mr. Schwalberg. The date is January 25, addressed to Mr. Schwalberg, Al Schwalberg, Paramount Pictures Corporation.

(5575)

This is your authority to disclose my bid COUNTRY GIRL to interested competing exhibitor for this picture.

William Goldman

Q. Now, have you any recollection of what it was that brought about the telegram that you sent to Mr. Schwalberg authorizing him to disclose your bid on COUNTRY GIRL?

A. Yes, sir, I have. The Arcadia Theatre, who I think did bid on the picture or were interested in the picture, asked that they be shown my bid and Mr. Schwalberg—and I granted that request, as you see by this telegram, permission to see my bid.

Q. Mr. Schwalberg at that time was an executive of Paramount?

A. He was general manager, yes, sir.

Q. And you recall testifying about the meeting you had with Mr. Schwalberg and others in 1953?

A. Yes, sir.

Q. Do you recall testifying as to whether there was ever a written agreement of the decision that was reached at the meeting in 1953?

A. Yes, sir.

Q. Did you ever receive a writing of any kind from Paramount or its legal counsel or anyone else—

A. No, sir.

(5576)

Q. —officially associated with Paramount setting forth the decision or the arrangement that had been reached at the 1953 meeting?

A. There was never a written agreement.

Q. Did you ever write a letter to Paramount at that time in 1953—

A. No, sir.

Q. —setting forth what has been discussed?

A. No, sir.

Q. You have testified that at that 1953 meeting you suggested and ultimately there was agreed to the idea of a split. From your knowledge and experience of the industry, Mr. Goldman, was a split a usual or unusual thing within the industry?

A. A usual thing. I have done it many, many years.

Q. How long to your knowledge have you heard of the fact of a split of motion pictures being used in the motion picture industry?

A. I did it the first year I was in business.

Q. And when was that, sir?

A. 1911.

Q. Was the Viking Theatre in existence as the Viking Theatre at the time of your meeting with Paramount in 1953?

A. No, sir.

Q. Had you any knowledge at the time of your meeting in 1953

(5577)

that Mr. Sley or anyone else was intending to create what became the Viking Theatre?

A. No, sir, none.

Q. Had you any intention or thought in 1953, at the time of your meeting regarding this idea of a split, of depriving any exhibitor by means of a split from access to motion pictures?

A. None at all.

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(5580)

Q. Let me try to make it clear, Mr. Goldman, if you haven't understood.

A distributor puts out let us say 25 or 50 pictures a year.

A. Yes, sir.

Q. Would that entire number of films be put on the split or would there be less than that number?

A. Oh, no, no. They would be done in numbers, they could be two, four, six or eight, but never the entire pictures he produced that particular year.

• • •

(5581)

Q. If there were a certain number of films put on what was called the Goldman side of split,—

A. Yes, sir.

Q. —did that mean that you actually licensed every one of those pictures?

A. No, sir.

Q. Did it mean that Stanley Warner licensed every one of the pictures that was put on its side of the split?

A. Yes, sir.

Q. It did or did not, sir?

A. It did.

Q. Are you suggesting that Stanley Warner—

Mr. Sawyer: Your Honor, he has answered the question. He can't cross-examine his own witness.

The Witness: I don't think I understood his

(5582)

question. When he said "license," they had access to those pictures.

The Court: Of course, I mean, the evidence heretofore produced shows he was wrong.

The Witness: They don't get every picture on their split. They have access to them.

By Mr. Rome:

Q. They have access.

A. But you said "license." They have access. That is what I meant, yes, sir.

Q. Now, from your experience what is the effect upon an exhibitor like the Viking which results from a split such as has been described here between Goldman's Theatres and Stanley Warner's Theatres?

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(5584)

Q. Have you the question in mind, Mr. Goldman?

A. Yes, sir, I have.

Q. Would you answer it, sir.

A. Yes, sir. In the instance of a split, as you just described, I do foreclose myself against half of the prod-

uct, which Mr. Sley has access to 100 per cent of the product.

Q. Does that therefore represent an advantage or disadvantage?

A. A tremendous advantage to him, sir.

Q. Now, returning, Mr. Goldman, to the subject of the meeting with Paramount in 1953, you have testified that Mr. Fabian was present. Is that the Mr. Fabian who has testified here as a witness in this case?

A. Yes, sir.

Q. You mentioned the name of another gentleman, Mr. Austin Kehoe. What was his position?

A. General counsel.

Q. Of what company?

A. Paramount.

Q. Do you know whether he is alive or dead?

A. No, sir, he has passed on.

(5585)

Q. You have mentioned the fact that another gentleman named Mr. Howard Minsky was present at that meeting. What was his position?

A. He was the district manager of Paramount and located in Philadelphia.

Q. Have you any knowledge as to whether Mr. Howard Minsky is to be a witness in this case?

A. Yes, sir, he—in fact, I was talking with him yesterday.

Q. Now, you have further mentioned that a Mr. Harry Kalmine was present at that meeting in New York. With what company was Mr. Kalmine associated?

A. The Stanley Company of America.

Q. Was he a subordinate under Mr. Fabian, whom you have referred to?

A. Yes, sir, yes, sir.

Q. Now, Mr. Schwalberg was also present at that meeting. With what company was he associated?

A. He was with Paramount, the geneneral manager in charge of distribution.

Q. Now, have you knowledge of whether or not Mr. Schwalberg is to be a witness in this case?

A. Yes, sir, yes, sir.

Q. Do you know whether or not Mr. Schwalberg continued to be associated with Paramount for any period of time following your

(5586)

meeting in 1953?

A. Shortly thereafter he resigned from the company.

Q. Did you at any time see Mr. Schwalberg after he left Paramount and was no longer associated with Paramount in any way?

A. Yes, sir.

Q. Do you know whether he had any—well, withdraw that.

With what frequency did you see Mr. Schwalberg after he was out of Paramount, no longer associated with that company?

A. Well, he visited my home, I visited his home, had occasion to talk with him frequently.

Q. Now, incidentally, how long have you known Mr. Schwalberg?

A. I have known Al Schwalberg from thirty some odd years.

Q. Inviting your attention—withdraw that.

Had you ever any occasion to discuss with Mr. Schwalberg, after your meeting in 1953, what had happened at that meeting in 1953?

A. Yes, sir, I did.

Q. Do you recall when that was that you had the discussion with Mr. Schwalberg?

A. Well, it was several years, and long after he left Paramount. He was a guest at my home. I am trying to fix—I think it was in the late summer, he and his wife visited me

(5587)

at my home.

Q. The late summer of what year, if you recall?

A. 1955.

Q. What sort of an occasion was that? Was that a business or social occasion or what?

A. Purely social.

Q. What happened on that occasion in so far as any discussion that you had with Mr. Schwalberg concerning what had happened two years before in 1953?

A. Well, Mr. Rome, it is a characteristic when show people get together the only thing they can discuss outside their own business is show business, and as we discussed many things about show business I had said to Mr. Schwalberg that I was having a discussion with Paramount which was going contrary to what occurred in '53 when he was there. And he asked me what it was and I told him about the fact that on negotiated pictures that they had refused to give me or they disputed my right to have an adjustment on pictures, and we talked about the thing in a general way. He knew as I described to him about what the terms of the deal was and he recalled pretty much what the whole arrangement was that I described here in court.

(5588)

Q. Now, what happened thereafter?

A. Well, his wife is an antique collector and she knew we was out in an area where there is a good many antique shows, and she wanted to know whether we would drive her to some place where she could find some antiques.

Mr. Schwalberg at that time had a very bad back, and he was invited to go and he said he would rather not go and riding in a car, so Mrs. Goldman and myself and Mrs. Schwalberg, we went out in the country, and when we got back he said, "You know, I have been thinking about what you were saying about Paramount and I have been trying to recall just what the situation was," and he said, "I

have taken your typewriter," and he says, "I have made a memorandum here of what I think recites exactly what took place," and he handed to me a piece of paper and I looked at it. I knew about the arrangement. It wasn't anything of any importance.

Q. Now, was there any further discussion about it at that time or is that the end?

A. Well, that is—I think that is—pretty much tells it.

Q. Now, is the document that was shown you yesterday by Mr. Sawyer a copy of the document that Mr. Schwalberg showed to you at that time in—

A. It was—

Q. —in 1955?

(5589)

A. It was not, sir.

• • •

Q. Did you read the document that Mr. Schwalberg showed you at that time, Mr. Goldman?

A. Well, I wouldn't say I read it fully, but I read—I was familiar with the arrangement and what he recited there in effect was what I understood and what I think he understood, too.

Q. Now, did you ever see it thereafter?

A. No, sir.

Q. Now, Mr. Sawyer also showed you yesterday a letter from Mr. George Weltner of Paramount dated December 12, 1955. Do you recall your testimony that in 1955 you said that you were having a difference of opinion, a grievance with Paramount? What did that have to do with, Mr. Goldman?

A. Well, after I got off the witness stand I met Mr. Minsky

(5590)

in the lobby, and I said to Howard, I says, "What is there in this Weltner letter? I am not clear on that."

He says, "Well, don't you remember"—

Mr. Sawyer: Your Honor, this is quite objectionable. I mean, the witness talked to Mr. Minsky yesterday afternoon—

The Court: I will sustain the objection.

Mr. Sawyer: —off the stand about what—

By Mr. Rome:

Q. Has your recollection then been refreshed, Mr. Goldman, as to the nature of the difference—

A. Yes.

Q. —of opinion?

A. Yes. It has, sir; yes, sir.

Q. And by whom was it refreshed?

A. By Mr. Minsky here.

Q. And on the basis of your recollection having been refreshed, what was the difference of opinion that you were having with Paramount in 1955?

A. Well, aside from the—the adjustments was the fact that Mr. Minsky, as I have said here previously, had the allocation of pictures, and I had complained to Paramount that I thought he was unfair in which he was allocating pictures. That was also—it did not occur to me when I answered Mr. Sawyer—

(5591)

but that was also one of the other things that was in there.

Q. Now, by "allocating pictures" you mean—

A. He would make the splits and he would allocate them to Warners and myself, and I thought there was a great inequity to that, and that is one of the things I bitterly complained to Paramount about, but it didn't occur to me yesterday or I would have answered it as I am doing this morning.

Q. Now, on the basis of that recollection having been refreshed, does that assist you in any way with regard to the fact that Mr. Harry Kalmine attended the luncheon that was referred to by Mr. Weltner's letter?

A. Yes, sir. Yesterday I didn't know how he was invited to that meeting. I couldn't understand it. But now it is clear to me, because the very fact that Mr. Weltner said there will be a change, meaning that he was withdrawing Mr. Minsky from allocating the pictures, he was going to leave it entirely between Warners and myself, naturally they were the interested people in this thing, and that accounts for his presence.

Q. Now, you have testified yesterday, Mr. Goldman, that one of the differences of opinion that you had with Paramount was your thought that you would be entitled to ask for an adjustment on a film that had been licensed to you by negotiation following the rejection of bids?

A. That is right.

(5592)

Q. Do you recall that testimony, sir?

A. Yes, sir. I do.

Q. Now, was there agreement or disagreement with that idea on your part so far as Paramount was concerned?

A. Yes, sir. There was.

Q. Which was it—agreement or disagreement?

A. Disagreement.

Q. Now, have you knowledge of whether there are differing views about that subject matter in the motion picture industry?

A. Yes, sir.

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(5593)

Q. Mr. Goldman, did you ever know a gentlemen named Mr. Ben Wirth?

A. Never knew the man in my life.

Q. Did you ever meet a man named Ben Wirth?

A. No, sir.

Q. Had you ever any discussions with Mr. Fabian or anyone in the Stanley Warner organization before the sale of the Stanley's Aldine Theatre?

A. None, sir.

Q. Did you or did you not have any agreement with anyone regarding Stanley's sale of the Aldine Theatre?

A. How could I? It is silly.

Q. Well, did you—

A. No.

Q. —or did you not?

A. Certainly not.

Q. Did you know that the Aldine Theatre was going to be sold?

A. No, sir.

Q. When first did you learn that the Aldine Theatre had been sold?

A. Well, I don't remember how long it was afterwards, but I did learn that it was sold to Mr. Sley.

Q. Now, thereafter did Mr. Sley or anyone in his organization

(5594)

ever express any complaints to you regarding anything that was happening in the motion picture industry?

A. None at all, sir.

• • •

Q. Have you personally during your career in the motion picture industry ever had anything to do with the Aldine Theatre?

A. Yes, sir.

Q. When was that, sir?

A. 1928.

Q. And from your personal knowledge what was the record of performance of the Aldine as a theater at that time?

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(5595)

The Witness: Well, it was always a problem theater to Warner Brothers. It wasn't very successful.

By Mr. Rome:

Q. When you say "Warner," you mean Stanley Warner?

A. Stanley—I am sorry—Stanley Warner; yes.

Q. Have you in any way, Mr. Goldman, interfered with or affected the opportunity of the Viking Theatre to have access and to license motion pictures on first run in Philadelphia?

A. None at all.

Q. Have you at any time ever asked any distributor to deprive the Viking in any way of the same opportunity that you have—

A. No, sir.

(5596)

Q. —with regard to films?

A. No, sir.

• • •

Q. Have you at any time or have you not, Mr. Goldman, ever asked any distributor to refrain from giving to the Viking Theatre the same opportunities that you have with regard to motion pictures?

A. No, sir.

Q. Have you or have you not at any time ever tried to influence the judgment of a distibutor with regard to adjustments that might be granted the Viking Theatre?

A. No, sir.

Q. Or adverfising terms?

A. No, sir.

Q. Or any other detail of any contract or matter having to do with the licensing and exhibition of films—

(5597)

A. None at all, sir.

Q. —by the Viking Theatre?

A. None at all, sir.

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By Mr. Young:

Q. The last question or so asked by Mr. Sawyer and I think by Mr. Rome, I think they both misspoke when they said, "all distributors." Do you recall that line of questioning—

A. Yes.

Q. —about all distributors?

A. Yes, sir.

Q. Well, as a matter of fact, Twentieth Century-Fox was never on the split, was it, Mr. Goldman?

A. No, sir.

Q. You have been in Philadelphia for a long time, of course, as you have testified, and is it not a fact that the Fox Theatre has always been a first-run theater?

A. Yes, sir.

Q. Did you ever at any time seek to prevent the Viking Theatre from bidding or negotiating for any Twenty Century-Fox

(5598)

picture that played at the Fox Theatre or anywhere else?

A. No, sir.

Q. Did you have any agreement of any sort with Mr. Fabian or any other representative of Stanley Warner whereby the Fox Theatre would play only Twentieth Century-Fox pictures?

A. No, sir.

Q. And, of course, the Fox Theatre was not a party to this split we have talked about—

A. That is right.

Q. —is that right? That is right.

A. Yes, sir.

Q. And you had no agreement whatever with the Fox Theatre?

A. None at all.

Mr. Young: Thank you, sir.

Mr. Ward: We have no questions, Your Honor.

By Mr. Wolf:

Q. Mr. Goldman, I will ask just a couple of questions. Did you at any time make any effort to influence any distributor with respect to the terms on which it licensed pictures to Stanley Warner or whether it licensed pictures to Stanley Warner?

A. No, sir.

Q. Did you know on what terms distributors did license pictures to Stanley?

A. No, sir. I would have no way of knowing it.

(5599)

Mr. Goffman: I have just one question, Your Honor.

By Mr. Goffman:

Q. Mr. Goldman, a few times in your testimony you used the name "Warners" alone when you were referring to Mr. Fabian or Mr. Kalmine or Mr. Fellman or to the theater exhibition company with which they are associated, and may we all assume correctly for the record that you meant to refer to Stanley Warner—

A. Stanley Company of America.

Q. —and not my client, Warner Brothers?

A. That is right.

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RE-DIRECT EXAMINATION

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(5600)

By Mr. Sawyer:

Q. Isn't it true that you only went after the Twentieth Century-Fox pictures that the Fox Theatre didn't want?

A. No. I didn't.

Q. That is not true?

A. No, sir.

Q. 109 deposition:

"Q. Did you make any effort to get away from the Fox Theatre the Fox product that the Fox wanted?

"A. No, sir, only what they didn't want."

You so testified, did you not?

Mr. Young: Read the next question, please.

By Mr. Sawyer:

Q. Is that right? Did you so testify?

A. You asked me did I bid on—offer—make an offer for any pictures the Fox didn't want.

Q. Yes, except—no, Mr. Goldman; my question was, wasn't it true that the only Fox pictures, Twentieth Century-Fox pictures that you ever went after were the ones that Fox didn't want, and you just told me that wasn't true. Now I read you the deposition. Now, which is the case?

A. Well, we never went after any Fox pictures. I think when

(5601)

there was a picture the Fox Theatre didn't want, it was offered to us. We would probably be interested in it or wouldn't be interested in it.

* * *

Q. Then, isn't it true that the only Fox pictures you ever went after were the ones that Fox didn't want?

A. I don't recall just whether it was other pictures.

Q. Well, didn't you recall at the time of your deposition quite clearly, Mr. Goldman? There is nothing equivocal about what you said here, is there? Nothing about recollection?

A. Well, Mr. Sawyer—

Q. The question is:

"Q. Did you ever make any effort to get away from the Fox Theatre the Fox product that the Fox wanted?

"A. No, sir, only what they didn't want."

Is that true?

(5602)

A. As a general thing we did not go after Fox pictures. The pictures that the Fox were not interested in, if they were offered to us, we would be interested in.

Q. Well, then the answer is that the only Fox pictures you ever went after were ones that they didn't want; isn't that the answer?

A. There may have been occasions when we did go after them. I don't remember.

Q. Well, now, can you tell me the occasions?

A. I beg your pardon?

Q. Can you tell me such an occasion?

A. The record would have to show. I wouldn't know.

Q. Well, does the record show any, to your knowledge?

A. Could very well be.

Q. And was it not true, then, when you said in your deposition that you only went after what they didn't want?

A. I have tried to tell you—

Q. Well, I want to know which is the case, what you said in your deposition—

A. Well, I don't think I understood the question that was put to me at that time, and I would just like to amplify it by—

Q. You didn't understand it in the deposition or the one I just put to you?

A. No, in the deposition.

(5603)

Q. Now, what is the case?

A. Well, the case is that we didn't go after Fox pictures at any time, as a general rule. When there were pictures offered to us by Fox that were available or offered

to other exhibitors, we had an opportunity to bid on them or negotiate for them. If we showed any interest in, we must have acquired some.

Q. And wasn't that just the pictures that they didn't want?

A. Well, I wouldn't know what they wanted or didn't want, Mr. Sawyer.

Q. Well, what did you mean when you answered this question, Mr. Goldman, in your deposition? What did you mean by that, "No, sir, only what they didn't want"?

A. Well, I am trying to—

Q. What did you mean by that?

A. I am trying to tell you now what was in my mind then.

Q. No. I am asking you what you meant—and you told me that—I am now asking you what you meant when you answered the question, "No, sir, only what they didn't want."

A. Well, I have no right to say what they didn't want or did want.

Q. That is not responsive.

A. What they had left—

Q. That is not responsive, Mr.—

A. —if they offered to me—

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(5604)

Q. Not what you had a right. I am only asking you one question, Mr. Goldman.

A. Well, then I don't think I understood the question.

Q. Well, now, I will make it as simple as I can.

A. I am talking about the time that—

Q. Please do not interrupt.

What did you mean, sir, when you said in answer to the question that, "No, sir, only what they didn't want"? What did you mean by that?

A. I can't recall just what was in my mind when I answered that, but they could have very well have bookings and didn't have need for a picture.
What did you mean by that?

Q. Very well; but your answer is you don't recall what you meant when you answered that? Very well.

A. I am trying to restate it,—

Mr. Sawyer: That is all.

The Witness: —to give a—

Mr. Sawyer: Thank you.

Mr. Young: Now, will you read the rest.

Mr. Sawyer: I will read the rest. Oh, yes; I will read the rest.

The Court: All right; just read the rest of

(5605)

that. Mr. Sawyer will read that.

Mr. Sawyer: All right.

"Q. Now, did you make that arrangement with anybody at the Fox Theatre, or Twentieth Century-Fox?

"A. No, sir."

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(5608)

Q. Now, you have testified in response to Mr. Rome's questions that you thought that it was a tremendous advantage to the Viking that you and Stanley Warner were on the split?

A. Yes, sir.

Q. Now, did you consider it a tremendous advantage to you before you were on the split?

A. Before I was on the split?

Q. Yes.

A. I don't think I understand your question, Mr. Sawyer.

Q. Well, you said that you thought—

A. Before the split?

Q. Yes. Do you think you had a tremendous advantage then?

A. What split are you speaking of?

Q. Oh, Mr. Goldman, there is only one split that I know of.

A. Well, there were various times from 1950 to 1953.

Q. Well, in any of them, when you were not on the split did you think you had a tremendous advantage?

A. Yes, there was, certainly.

Q. You thought you had a tremendous advantage then.

A. When I had the split, yes, sir.

(5609)

Q. Before you had the split, when you weren't on it, did you think you were at a tremendous advantage?

A. Yes, I think the advantages were reasonably good until bidding came in.

Q. Oh, now, all right, until bidding came in. But you made considerable efforts, did you not, to get on the split and set it up?

A. Yes, sir.

Q. And you must have considered that it was to your advantage to do so, I presume.

A. Yes.

Q. Now, isn't a disadvantage involved, and wasn't this what you complained of, that to acquire pictures you had to bid for them?

A. Yes, sir.

Q. And wouldn't that be a disadvantage to the Viking the same as it was to you?

A. Well, I think you have got to go back—

Q. Now, before we go back.

Mr. Rome: Wait a minute, sir.

The Court: He may answer. Proceed.

The Witness: In 1953, or prior to that, 1951 or 1950, there was no Viking Theatre in existence. There were no first-run theatres other than myself and Warner's,

(5610)

and whether it is an advantage or a disadvantage, I thought the equity was that I should have the same opportunities that they did.

Q. And now do you think that maybe the Viking thinks that they should have the same opportunities that you do?

A. I understand they had the opportunities.

Q. And do you bid on pictures, Mr. Goldman?

A. I beg your pardon?

Q. Do you bid on pictures now?

A. Do I bid on pictures?

Q. Yes. Not now, during the period of this suit, were you bidding on pictures?

A. I think Mr. Beattie will have to answer that question.

Q. Well, you know, Mr. Goldman, don't you, that the whole purpose of setting up the split, as you have testified here several times, was so that you wouldn't have to bid?

* * *

Q. That is the reason you set up the split, isn't it, Mr.

(5611)

Goldman?

A. It was reasonably assumed that there was some advantage in that respect, yes, sir.

Q. Well, there is no question, is there, since you have testified to that?

A. I beg your pardon?

Q. Is there any question that you have said repeatedly that the objection you had was that you had to bid to get pictures?

A. Well, I didn't get every picture I bid on, Mr. Sawyer.

* * *

Q. I am asking you, Mr. Goldman, whether or not you were not motivated to set up the split by this very thing, that you said for you to get pictures you had to bid; wasn't that your reason?

A. Well, I think the advantages primarily were that I had one less person to bid against, to compete with.

Q. Well, you were only competing with Stanley Warner then?

(5612)

A. Three theatres.

Q. All right. With their three theatres.

A. Yes.

Q. And your three theatres?

A. Yes, that is right.

Q. All right. Now, didn't you say, when you first started to set up the split—I won't go through the whole thing again unless we have to. What was it, with Loew's, Mr. Rogers, that your complaint was, and I am quoting from your first deposition in this case on this subject.

Mr. Rome: What page?

Mr. Sawyer: Page 10.

By Mr. Sawyer:

Q. "Well, Warners was getting all those pictures, they had all the pictures, the only way I could obtain those pictures was by bidding on them, and I told them I wanted a division of the pictures with Warners without having to meet the bidding situation and I indicated how unsound it was economically to acquire those pictures."

Now, that, Mr. Goldman, was your reason, was it not, for trying to set up the split?

A. If that is what the letter says I did.

(5613)

Q. And that is a disadvantage, in your opinion, is it not, to have to bid each time to get a picture?

A. Well, at the present day it is a disastrous thing for me.

Q. Not at the present day, Mr. Goldman. We are talking exclusively now during this entire case.

A. That may be what I thought at that time.

Q. And you considered it a disadvantage, didn't you?

A. Yes.

Q. And you still do, don't you?

A. No. I don't think I have made myself clear or you don't understand me.

The disadvantage was I thought I should have an equal opportunity for those pictures that Warners had—or Stanley Company, I am sorry.

Q. And don't you still consider that it is a disadvantage to have to bid?

A. To bid?

Q. Yes. You still consider that to be true, don't you?

A. I think today we have no other choice but to bid.

Q. Yes, but isn't it a disadvantage to you?

A. I beg your pardon?

Q. Isn't it a disadvantage to you, Mr. Goldman, don't you feel that way?

(5614)

A. Well, as I said to you, previously, it is pretty difficult to look at a picture and tell what it is going to gross.

Q. And during the period of this suit that was also true, was it not, that the bid was a disadvantage?

A. Yes, sir.

Q. All right. A disadvantage. Thank you.

Now, Mr. Goldman, turning again to this question of a memorandum—

A. Yes, sir.

Q. —of the agreement or arrangements made and reached at the time that you met with Mr. Schwalberg, do you recall when you were first asked about whether there was any such memorandum? When were you first asked about that, whether there was one in existence?

A. Yesterday.

Q. You were asked actually on your deposition, were you not?

A. On a deposition?

Q. In 1958. You were asked about it then, weren't you?

A. I don't recall.

Q. Well, on page 29, I believe the then attorney asked you a question, and this is in reference to this meeting, as counsel can check. Now listen carefully if you will, Mr. Goldman.

(5615)

"Q. Were any memoranda made afterwards?"

Mr. Rome: I object to that, Mr. Sawyer. I think if you are going to start this you should take the earlier question, which obviously precedes and leads into it.

Mr. Sawyer: I will be glad to.

Just the first one before, Mr. Rome?

Mr. Rome: Yes, please.

Mr. Sawyer: All right.

By Mr. Sawyer:

Q. "Q. Do you remember anything that he said at this meeting that you have described at Paramount? Were any notes made of the meeting by anybody present?

"A. I didn't make any notes."

and then—

A. What period are you talking about?

Q. You don't know what date I am talking about?

A. No, I don't know what period you are talking about. Or what meeting? You are talking about the deposition?

Q. No, Mr. Goldman, I am talking about the meeting which was the meeting that you had with Mr. Schwalberg and the others.

A. Yes, sir.

Q. The meeting with respect to which you have been asked

(5616)

in this trial yesterday.

A. Yes, sir.

Q. And then this morning—let me finish, because I want to be sure you understand what this is now.

Were there any memoranda written by anyone concerning that meeting, stating what was done at that meeting?

A. Not to my knowledge, no, sir.

Q. Well, not to your knowledge—Mr. Goldman, didn't you just testify to Mr. Rome this morning—

A. That is right.

Q. —that there was one written down in your house?

A. I beg pardon. Well, now, you are talking about—all the time that you have been asking me I am thinking in my mind you are referring to what happened in 1953. Was there a written agreement by Paramount with myself? And never any time did I understand you to say anything different.

Q. Now, let us see what the questions were?

A. Right, sir.

Q. And what your answers were.

A. Yes.

Q. Then we can judge what the questions called for.

Now, with respect to this same meeting, with Paramount, Mr. Schwalberg, the same meeting.

(5617)

A. Yes, sir.

Q. You were asked on your deposition this question—

Mr. Sawyer: Do you want me to read the first one again?

Mr. Rome: Yes, please.

By Mr. Sawyer:

Q. There are two questions:

"Q. Do you remember anything that he said at this meeting, that you have described, at Paramount? Were any notes made at the meeting by anybody present?

"A. I didn't make any notes.

"Q. Were any memoranda made afterwards of what was said at the meeting?

"A. No."

Mr. Sawyer: Now, just a minute. I assume that the rest will not be read of that question?

Mr. Rome: Well, you can at least take it up to the word "action."

Mr. Sawyer: I will if you want to.

Mr. Rome: No, you are right.

Mr. Sawyer: All right.

Mr. Rome: Thank you.

By Mr. Sawyer:

Q. "Q. Were any memoranda made afterwards of what

(5618)

was said at that meeting—at the meeting?

"A. No."

And you so testified in 1958.

Now, just a moment.

Now, then, yesterday, Mr. Goldman, I asked you the following question.

Mr. Rome: What page, Mr. Sawyer?

Mr. Sawyer: Page 5184.

By Mr. Sawyer:

Q. (Continuing) "Q. And was there ever a memorandum made of what was agreed to at that time?

"The Witness: No, sir."

Mr. Rome:

"And was there ever a memorandum made of what was agreed to at that time?"

Mr. Sawyer: Just let me finish, Mr. Rome. I am doing this because you would be the first one who would want me to read all of the questions on the subject.

By Mr. Sawyer:

Q. (Continuing) "Q. And was there ever a memorandum made of what was agreed to at that time?

"The Witness: No, sir?"

Then there were objections and it was overruled, and I rephrased the question.

(5619)

"Q. Was there ever made in your presence or to your knowledge a memorandum by anyone as to the agreement reached at that meeting?

"A. No, sir."

The Witness: I still repeat it.

By Mr. Sawyer:

Q. All right, now, there was a memorandum you now tell us made at a later date as to what took place at that meeting, was there not?

A. That is right.

Q. Yes. So that you wish to withdraw that?

A. I do not, no, sir. I do not wish to withdraw it.

What I said to you was correct, and I am referring—you asked me, as I understood you to say, it was my interpretation, that you were referring to whether Paramount and I had entered into a written agreement.

Q. Mr. Goldman, I asked you that previously. Now, you listen to this question if you will.

A. Mr. Sawyer, could I say—

Q. Will you listen to my question.

A. You said I wasn't responsive and I was volunteering, and you didn't give me an opportunity to explain it.

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(5620)

Q. Now, Mr. Goldman, this is the question you were asked yesterday and you tell me whether or not you thought this referred to a written agreement at the time of the meeting.

"Q. Was there ever made in your presence or to your knowledge a memorandum by anyone as to the agreement reached at that meeting?

"A. No, sir."

A. I still was under the impression that you were talking about Paramount agreement.

Q. I was talking about—

A. That is right.

Q. Did you understand from that question that when I said "ever" I meant ever?

A. I am under one impression, you were referring to an agreement by Paramount and myself contemporaneously with an arrangement made in 1953.

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(5621)

Q. Now, you started to tell us, Mr. Goldman, that after the visit to the antique shop Mr. Schwalberg typed a memorandum out then at your house, did he?

A. When I came back, yes, sir.

Q. Was he with you? I don't quite follow you.

A. He was not with me, no, sir, he was at my home. I testified to that.

Q. Now, you had brought up with him, as I understand your testimony in answer to Mr. Rome's question; you had brought up with him the fact that Paramount was not living up to the arrangement that you had made with him; is that correct?

A. I didn't say they weren't living up. I said we had a disagreement.

(5622)

Q. Well, I am sorry.

A. A controversy. I think I said controversy.

Q. And didn't you say that Paramount was doing something contrary to what Mr. Schwalberg had—the arrangement you made with him?

A. Yes, sir, I did.

Q. And you then asked him to recall what those arrangements were, is that correct?

A. Well, I mean, let me tell you just how it occurred. When I got back, after we were out for a drive and got back, Mr. Schwalberg said to me: I have been thinking about what we were discussing, and, he said, I have made a memorandum to recall my recollection just what took place in that 1953 meeting.

Q. Now, this was beause you were then having this controversy with Paramount?

A. Well, there was a new administration came in and here was my friend trying to recall to me, at least give me what he thought—

Q. Yes.

A. What he believed, as I believed, was our arrangement.

Q. I understand that. And so then did he give it to you so you could take it to Paramount and say this was what their president said?

(5623)

A. I didn't go back to Paramount. There was nothing—

Q. You misunderstood my question.

Mr. Nizer: Please.

By Mr. Sawyer:

Q. My question was, did he give it to you so you could take it to Paramount.

A. No, sir.

Q. Well, what was the purpose of typing it out if you weren't to have it? He wasn't in Paramount any more, was he?

A. Mr. Sawyer, I didn't attach—I knew what my arrangement was with Paramount, and I was in process of trying to iron out my problems with them.

It didn't help me at all, it only confirmed my recollection—at least my understanding and his recollection of what really took place.

Q. Then why—

A. I didn't attach any importance to the memo.

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(5624)

Q. And after he showed it to you did you read it?

A. Yes, casually, I read it. I knew what our arrangement was.

• • •

Q. Now, you read it; where were you at this time?

A. In my home.

Q. At your home?

A. Yes.

Q. You had the document; did you hand it back to Mr. Schwalberg?

A. I don't think I did.

Q. What did you do with it?

A. I probably took it down the office the next day and gave it to my secretary and it was filed.

Q. Oh, well, now, can we obtain a copy of that document?

A. Mr. Sawyer, you people have been there for months and have had access to our files, our records. You photostated everything, and anything that you wanted was there for your—

(5626)

Q. You took it actually to your office and gave it to your secretary to be filed?

A. What it might be customary for me to do is to take it to my office. I don't remember whether I put it in my pocket and took it to the office. I know what has been my custom. Any papers I get I will take to the office. I can't say that this particular—I didn't attach any importance to that because it had no great importnce to me.

Q. Very well. So that your recollection would be, and the custom was your practice, that you took that document back to your office?

A. I would say I took that document—I know what has been the practice. Whether it was that particular document, I wouldn't say.

When you say "document," it was nothing but—I regarded it as a very unimportant piece of paper because I knew what my arrangement was with Paramount. What he was telling me was just a confirmation of what I knew.

* * *

(5627)

Q. Wouldn't it be helpful to you in your controversy with Paramount that you were having then to have a

written statement by the former president as to what his understanding of the arrangement was?

The Court: Answer the question:

A. Well, Mr. Sawyer, about that time I had made up my mind—

Mr. Sawyer: Your Honor, I do ask that the witness be directed to—

Mr. Rome: He has tried to, Mr. Sawyer, if you will allow him to.

The Court: You see, Mr. Goldman, Mr. Sawyer asked you whether you think it was important that you have it.

A. No, sir.

The Court: Answer yes or no and then say why.

A. It was not important.

The Court: Now why? You can explain why you don't think it is important.

A. For the reason that I had made up my mind that I was going back to bidding on pictures, and as far as the understanding

(5628)

I had with Paramount, it just was academic, it didn't mean anything.

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(5639)

Q. Now, Mr. Goldman, whatever interpretation you put on my question of yesterday with respect to whether or not there was ever a memorandum made, I asked you also, you recall, yesterday, after asking you those questions, I then turned and I asked you whether this document consisting of two sheets which has been marked

P-190, whether this document refreshed your recollection as to whether or not there had been a memorandum made.

A. I looked at it yesterday. The same thing, the same answer applies. It does not.

Q. And you were certain that that document was not the one that Mr. Schwalberg typed out?

A. I am certain, yes, sir.

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(5663)

Q. Now, referring now, Mr. Goldman, to the Plaza Hotel meeting in December of 1955,—

A. Yes, sir.

Q. —do you recall that you testified yesterday that the subject was a grievance which you had with respect to adjustments?

A. That is right, sir.

Q. And then you testified that between yesterday and today your memory was refreshed by having talked to Mr. Howard Minsky?

A. That is right.

Q. And that you then added to the subject of adjustments an additional subject which was what?

A. I talking with Mr. Minsky later in the afternoon at the hotel he then said, "You don't know—don't you remember that you complained to Paramount about me and the method and the

(5663a)

manner, unfair manner in which I was allocating pictures?"

Q. All right.

A. And that was clear to me then; yes, sir.

Q. So then you recalled that that was an additional subject that you had taken up at Plaza Hotel meeting; is that right?

A. The subject could very well have occurred, come up at that time. I can't recall just having a conversation.

(5664)

Q. I show you P-7 again, which was the—we had it yesterday, it was a letter written to you by Mr. George Weltner.

A. Yes, sir.

Q. (Continuing) In which he said that, at our conference at the Hotel Plaza last Thursday—do you recall that?

A. Yes, sir.

Q. And then quoted you in substance?

A. Yes, sir.

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(5665)

Q. Is there anything in there about Mr. Minsky having operated the split in what you consider is an inequitable manner?

A. No, Mr. Minsky's name is not mentioned in here, no.

Q. Or anybody else having assigned pictures in a manner which you consider to be in favor of Stanley Warner.

A. Well, this letter didn't purport to set out my grievances. This was a confirmation of what Mr. Weltner presumed was my understanding.

Q. Well, it was a confirmation, was it not, of what the discussion had been at the Plaza; isn't that what the letter purports to be?

A. I don't—at the time I didn't recall just what was discussed with reference to Mr. Minsky's conversation yesterday.

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(5667)

GEORGE T. BEATTIE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Beattie, by whom are you employed?

A. William Goldman Theatres, Inc.

Q. In what capacity?

(5668)

A. I am buyer and purchasing agent.

Q. Are you an officer of the company?

A. Yes, sir.

Q. What is your position?

A. Vice-President.

Q. And do you do the film buying for all of the Goldman Theatres?

A. Correct.

Q. By whom were you employed before you were employed by William Goldman Theatres, Incorporated?

A. Who? William Goldman.

Q. Prior to that time.

A. I was employed by Paramount Pictures for twenty years.

Q. Now, is there, Mr. Beattie, a difference, in your experience, between competitive bidding and negotiation?

A. Yes.

Q. What is the difference?

A. Competitive bidding is when you bid for a picture and you stay by or live by that offer or that bid which you make.

Q. Yes?

A. Negotiations are when you negotiate with the parties that own the picture or distribute the picture, in which you negotiate, on my part, for as good a deal as I can make.

Q. And you don't have to live by it?

(5669)

A. You live by it with the understanding of the contract. You can, in my opinion, on a negotiation, ask for an adjustment.

Q. In your opinion can you ask for an adjustment on a picture that has been bid?

A. I think you could. Some companies hold one position, other companies hold another.

Q. Well, is that a difference or is it not a difference, Mr. Beattie?

A. Well, I think that—when I negotiate for a picture I believe that I am entitled to an adjustment if the picture doesn't perform the way it should. On a bid I do not believe I am entitled to an adjustment.

Q. So that is an advantage of negotiating over bidding, is it not?

A. Yes, I would say that if I can negotiate a picture I would rather do it than bid it.

Q. Now, who is Bert Pirosh, Mr. Beattie?

A. He was the film buyer for National Theatres.

Q. What connection was National Theatres with Fox Philadelphia?

A. National Theatres I believe operated the Fox Theatre in Philadelphia.

Q. Was Bert Pirosh—where was he located?

(5670)

A. He was located in a—his office I believe, his headquarters were in his office in California.

Q. And would you see him from time to time?

A. If he were in Philadelphia he may call me. Sometimes he may not have. I don't know. I would see him if I ran into him or if he happened to—

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(5671)

Q. Who is Mr. Pirosh?

(5672)

A. Mr. Pirosh is the film buyer for Fox West Coast Theatres or National Theatres.

The Court: Now, during the period of this suit was Fox Philadelphia owned by the National Theatres?

The Witness: National Theatres, yes, sir.

The Court: And Pirosh was what?

The Witness: Film buyer.

* * *

Mr. Sawyer: Now, the question, Your Honor, is whether or not from time to time when Mr. Beattie saw Mr. Pirosh he would advise Mr. Beattie as to what pictures Fox Philadelphia was not going to use and which would be available to the Goldman Theatres.

Mr. Young: Your Honor has my objection. If it is one of the 87 pictures, of course, we have no objection. Your Honor has limited this case to the matters in controversy here. If he can lay a foundation to show that he was deprived of any picture because Mr. Beattie had a conversation with Pirosh, of course, we have no objection, but I do believe that a foundation should be laid for that, and that is the basis of my objection, Your Honor.

The Court: What do you propose to prove by the

(5673)

answer to that question?

Mr. Sawyer: Well, Your Honor, I think it goes not to the question of superior bids, or in the sense of

the damage side, but to the conspiracy side, if National Theatres has an arrangement whereby—

Mr. Young: Isn't that a sort of a little speech perhaps?

Mr. Sawyer: Well, Your Honor asked me a question.

The Court: I am permitting it, Mr. Sawyer. You proceed.

Mr. Sawyer: That if they have an arrangement, we can show that they have an arrangement whereby the product of Twentieth Century-Fox will be exclusively played in the Fox Theatre except for what is left over, and as to what is left over they inform, the Fox Theatre exhibitor chain informs the Goldman chain: We are not going to need this picture, or this picture, or that picture, because the Fox is filled up, you go ahead, and if the Goldman chain never picks a picture other than those, and if, even as to those motion pictures, the ones that are left over, Viking has to bid for any pictures that it seeks—whether they know they are left over or not—and the Goldman chain does not, isn't this an arrangement horizontally between two exhibitors who are

(5674)

defendants and vertically with one of the distributors? This, it seems to me, is an agreement. It doesn't have to be written down. I want to know from the witness whether or not he didn't get such information from Pirosh. There is nothing illegal about giving it, but it is again whether we got it, and so on.

Mr. Rome: Mr. Sawyer has said, sir, that there is nothing illegal about such a situation if it were to occur, as I understand it, but I would bring to Your

Honor's attention that Mr. Sawyer's own personal handwritten list of Twentieth Century-Fox pictures shows that not a single picture out of the 87 in so far as Twentieth Century-Fox was concerned ever went to any Goldman Theatre. Although Viking was interested in 16 and got 8, I believe, Goldman never got any one of the pictures in which Viking was interested and as to which Viking made a bid or offer. And therefore the area now attempted to be opened by Mr. Sawyer in the question of Mr. Beattie would be going into an entirely new avenue, sir, far beyond anything which is involved in the 87 pictures, and, therefore, would be once more breaking new ground.

I would object to it, sir.

Mr. Young: May I reply just briefly to Mr. Sawyer, Your Honor?

The Court: Yes.

(5675)

Mr. Young: He leaves the impression with the jury, Your Honor, that the Viking had to bid for every picture to secure it. Of course, that is not true. They licensed a number directly without bidding, and, as I said to you yesterday, it would be going beyond the record in this case, the Fox Theatre bid for all pictures, it licensed a most substantial number after this Viking Theatre asked for bidding, and it was afforded, but, in addition to that, Viking did play a number of pictures on direct negotiation, as opposed to competitive bidding, and, as Mr. Rome says, there is not one single Twentieth Century-Fox picture in which plaintiff was interested that played at the Midtown, the Randolph or the Goldman Theatres.

The Court: Objection sustained.

* * *

(5676)

Q. Mr. Beattie, did there come a time when the Goldman Theatre changed their prior practice and began to bid for Paramount pictures?

A. Yes.

* * *

Q. When was that?

A. I don't remember the exact date but I think it was sometime in late '55 or early '56, with the exception of two pictures I believe we bid on, which was COUNTRY GIRL and I think CATCH A THIEF.

Q. Up to that time during this period you had bid on no pictures at all, is that correct?

A. I don't remember any at the moment.

Q. Well, you were the one who swore to the answers to the interrogatories?

A. Yes.

(5677)

Q. And you are familiar with that list that you prepared, or would you like me to show it to you again?

A. I would like to see it.

Q. Is that the answer that you prepared, Mr. Beattie?

A. I believe so.

Q. Is what is on there correct and true?

A. Well, there were two pictures that are not on here. COUNTRY GIRL and TO CATCH A THIEF I believe are the two.

Q. Isn't that because you elsewhere answered in that interrogatory that you did not bid on COUNTRY GIRL?

A. No, that is not why. COUNTRY GIRL, when I went through my files to find my pictures that we had bid on, I had no copy of the bid which was made.

As to CATCH A THIEF, that was a pure oversight or it was missed, but I had nothing in my files to remind me of COUNTRY GIRL.

Q. And you answered then at that time that there was no writing on COUNTRY GIRL?

A. Well, I, as a matter of fact through error said there was no bid on COUNTRY GIRL and there was. I said I didn't know about it or it didn't remind me because there was nothing in the folders to indicate it, and I had just forgotten it at that time.

Q. All right, I will accept that, Mr. Beattie, that the pic-

(5678)

tures that are listed here, six Paramount pictures during the period of the suit, which are those on which you bid, that to those should be added the motion picture COUNTRY GIRL and the motion picture TO CATCH A THIEF.

A. I think CATCH A THIEF was one.

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Q. Now, at the three theatres I suppose you played a couple hundred pictures during the period of this suit; would that be a fair statement?

A. I haven't counted them but I would say it was around that number.

Q. That comprises, then, with the two additions that you now make, all of those on which a bid was made?

A. As far as I know, sir.

Q. And when I say a bid, we mean, do we not, even an oral or a written bid?

(5679)

A. Well, I would have no copy of an oral bid if I made one. That would be possibly something that was set by a distributor, if it was an oral bid. I couldn't answer that at this point.

Q. How did you answer the interrogatory then, Mr. Beattie?

A. I answered it to best of my knowledge. I had no record of any oral bids nor did I keep a record if I did make an oral bid or didn't, so I answered as best I could.

Q. In other words, to the best of your knowledge—and you are the film buyer—those are the only motion pictures out of all of the hundreds on which an oral or written bid was submitted by Goldman?

A. There may be oral bids but I couldn't state what they were at this time.

Q. And you can't think of any now to add to that list, can you?

A. No, I can't.

Q. Now, on the motion picture BRIDGES AT TOKO-RI—you recall that motion picture, do you?

A. Yes.

Q. When you signed that, do you recall the terms—if you don't, I will show it to you, but maybe you recall—do you recall the terms, the percentage terms that you contracted that picture for?

A. No. I would like to see the contract if I may.

(5680)

Q. Well, while Mr. Steinberg attempts to locate that, if we may save a minute, did you ever make a bid, oral or written, on any Universal picture?

A. I don't believe Universal was bidding during this period. I don't think anybody was bidding on Universal.

Q. You played Universal pictures?

A. Yes.

Q. Do you recall that you got four of them on one particular day? Was it 11/8/55?

A. I don't recall any date or any day that I bid or not bid, negotiated or not four or five.

Q. Would it be a fair statement that you never bid, oral or written, on any United Artists picture?

A. Well, I would have to go back to my other statement. If there were oral bids, I don't remember at this

time. There may have been, and I would have no record of it.

Q. It is certainly clear there were no written bids?

A. According to the statement here there were no written bids.

Q. And you filed under oath a statement that there also were no oral bids?

A. I did. But I said to the best of my knowledge.

Q. To the best of your knowledge.

A. At that time.

Q. Did you play some Fox pictures during the time of this

(5681)

suit?

A. I don't know. I may have.

Mr. Rome: That has already been gone into just a few moments ago before the recess, sir, that there were no Fox pictures as to which the Viking expressed any interest that were played at any Goldman theatre. Your Honor will recall that we had that matter just a few moments ago.

Mr. Sawyer: Well, Your Honor, do I—

The Court: How do you answer that?

Mr. Sawyer: Well, I suppose it is almost impossible for me, Your Honor—I don't mean to transgress your ruling, but if Your Honor will not permit me to ask outside of this 87, I guess I can't ask him about the Fox pictures and whether he ever bid on any. I would have to agree, there is no use re-arguing it. I just never conceived, even on the argument of the 87 that Your Honor would apply it to matters that are outside of that field and really in terms of the conspiracy field.

I won't ask Your Honor to re-argue it. We certainly have done that a lot of times. But when I ask

some of these questions, they have been prepared for some time, and I don't want Your Honor to think I am just deliberately transgressing your ruling.

(5682)

The Court: Oh, no. No, indeed, Mr. Sawyer.

Mr. Sawyer: It is very hard to—

The Court: No, indeed, I certainly don't think in those terms at all.

Objection sustained.

By Mr. Sawyer:

Q. Would it be true that you played a number of Warner Brothers pictures?

A. I believe we played a number.

Q. You played some pretty big Warner Brothers pictures, didn't you?

A. I think so.

Q. Well, what were some big ones that you could recall, Mr. Beattie?

A. Druing this period I think we played BATTLE CRY.

I would need the list to refresh my memory on the big ones at that time, during that period.

Q. Except for TOWARD THE UNKNOWN and BABY DOLL were there any that you bid on?

A. No, apparently not. They are the only two listed on this sheet.

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(5683)

Q. You never bid on any RKO picture according to that, is that correct?

A. RKO, I don't know whether they were bidding at the time. They were kind of going out of business and they didn't have too many good pictures. It was sort of

a negotiated thing. Their product was limping at the time.

Q. How about Columbia, you played some pretty big Columbia pictures. You recall those, I am sure.

A. Well, as I remember it, Columbia was not bidding at that time. I am not sure.

Q. Didn't you get a letter from Columbia, for instance, on CAINE MUTINY?

A. I don't remember that. I would have to see the letter.

Q. How about PICNIC?

You played CAINE MUTINY, of course.

How about PICNIC?

A. I don't know whether we got a bid letter or not.

Q. No, I am asking you now, you played PICNIC, though, didn't you?

A. Yes.

(5684)

Q. And there is no Columbia picture on this list, is there, as being bid?

A. I said I don't think Columbia was bidding at that time.

Q. Do you know whether or not any of their competitors were making written bids for Columbia pictures?

A. No, I don't.

Q. But you in any event did not?

A. To my knowledge, I did not.

Q. Now we will come back for a moment to TOKO-RI. We have the contract now. It has been marked P-13 and I show it to you and ask you what the terms were.

Mr. Rome: May I see that, please, Mr. Sawyer?

Mr. Sawyer: I am sorry, it is P-12. Do you want to see it?

Mr. Nizer: Yes.

By Mr. Sawyer:

Q. You didn't recollect these particular terms and I ask you what those terms were on P-12.

A. To play the Randolph Theatre indefinite run, length of run to be determined by the distributor. Terms 50 per cent weekly.

Q. 50 per cent?

A. Yes.

Q. And at the time you signed that contract--you signed it,

(5685)

I take it, Mr. Beattie, did you?

A. Yes, this is initialled by me, this copy.

Q. Initialled. Well, you entered into the contract I take it on behalf of William Goldman Theatres?

A. Yes.

Q. And at the time that was signed did you have an understanding with Paramount that the 50 per cent terms would be changed?

A. I believe I had a dispute with Paramount at that time on the terms on this picture. I believe it was agreed to 50 per cent on the first week and to apply a scale on the following weeks. I believe when I got this contract it didn't agree with what I had understood, and I believe I held the contract up for some time until I discussed the situation with either Mr. Minsky or Mr. Smith or both.

Q. But my question is whether or not you had an agreement at the time you signed it that it would be changed.

A. My recollection is that Mr. Minsky and Mr. Smith came over to my office and discussed by disagreement, and I had refused to sign it at that time. However, I believe it was resolved. As a matter of fact, I think it was some time later that they did type up the contract incorrectly. I agreed to sign the contract and they would change their copies. The copy I have is an exhibitor's copy of applica-

tion, which is the one I kept for my file, and I believe they agreed to change

(5686)

their copies when they went back to the office to agree with our negotiated deal.

Q. Well, I would like you to answer the question if you can, Mr. Beattie, and that is you did sign that contract?

A. I initialled this contract. It was an application for a contract.

Q. That is a contract, isn't it?

A. It is an application for a contract. It is not an approval.

Q. Was it subsequently approved?

A. It was subsequently approved the way we had discussed the negotiation.

Q. Well, at the time you signed it you were offering certain terms then, were you?

A. In my interpretation of it I negotiated terms of 50 per cent for the first week.

Q. Well, why didn't you just change it at the time you signed it, Mr. Beattie, to the terms that you understood the negotiation had called for?

A. Paramount agreed to change it and I gave it to them to change.

Q. Isn't it true that you had an understanding that you would sign that contract at 50 per cent, that subsequently it would be changed?

A. I said what I think happened, Mr. Sawyer.

(5687)

Q. Well, you had that understanding at the time you signed it, did you not?

A. I had an understanding at the time I signed it. After this dispute, sometime after, we had talked about our negotiation and we changed it to what was my version of what I negotiated.

Q. And that understanding that you had you had at the time you signed that contract, didn't you?

A. Yes.

Q. All right, that is all I want to know. At the time you signed that contract you had an understanding with Paramount that the terms would be changed?

A. The terms would be changed to what I understood originally.

Q. There was nothing to prevent you from changing them right there on that contract then, was there?

A. We had an agreement. They took the contract back and changed it.

Q. Well, did they do that or—strike that.

That picture had been out shortly before on bidding, hadn't it?

A. I imagine so.

Q. And the Viking had bid on it, did you know that?

A. No, I did not.

Q. Were the terms changed?

(5688)

A. The terms were changed to what the terms were that I had agreed to originally.

Q. But they were changed by an adjustment, weren't they? They gave you an adjustment?

A. No, they weren't changed by adjustment.

Q. They weren't? I will show you P-16 and P-17 and ask you what these two forms are.

Mr. Sawyer: You are familiar with these adjustments, Mr. Nizer.

By Mr. Sawyer:

Q. Now, can you tell me what P-16 and P-17 are?

A. Well, these are Paramount forms putting through a credit of a stipulated amount for various weeks of TOKO-RI.

Q. And that is the way in which the terms that you say were those that you actually agreed to in negotiation were changed; were they changed by means of that?

A. No. You have to understand the mechanics of this. Paramount at the time they sent the contract over to me probably told their billing department to bill it at the terms of the contract that they sent me. After that we had straightened the matter out. Naturally they were billed at what they told their Accounting Department to bill it at. Actually straightened the matter out and corrected it.

Q. And this is what they used to correct it, isn't it?

(5689)

A. Well, being in distribution as I have I am familiar with part of this, as to the mechanics of it, and that doesn't say that I didn't have or that the contract was put through at the time on terms of 50 per cent for the whole engagement.

Q. Isn't there a heading saying "Original Terms"? Do you see that heading "Original Terms" and then underneath that it says 50 per cent?

A. Well, this is a form. The mechanics in Paramount, any change they would have to make in their records. They would fill this out as a mechanical problem.

Q. I understand that, Mr. Beattie, but I would like to ask you whether or not you do not see an entry on this form of Paramount which says "Original Terms, 50 per cent second week."

A. Yes, with an explanation.

Q. Do you see that?

Let me ask you the next one and you can explain.

Then is there an entry "Superseding Terms, 37½ per cent second week"?

A. Yes, with an explanation.

Q. Those two entries are on there?

A. In order to—

Q. Now if you care to explain, go ahead.

A. In order to change what they had billed in their office,

(5690)

they would necessarily have to put this through. However, I had not agreed to these terms down here and they told their Accounting Department originally, I presume, to put this through at the terms they understood they sent the contract over to me for. After we had straightened the matter out as to what they acually were this had to be put through to clear their records as to what they had told them previously, regardless of what the original terms say or rebidding says. This is a form that they use. They don't type up here "Our conversation was incorrect," and so forth. This is what they originally told them. This is an inter thing with Paramount.

Q. What are the dates of those film rental credit slips?

A. They are dated March 10.

Q. March 10. And the date of your contract was what?

A. It is blurred here. It is January something.

Q. And your testimony is that what you signed your initials to in terms of 50 per cent is not really what the agreement was?

A. That is correct. This is a copy that I keep in my office when I sign it. It is an application for a contract. When I signed this and after we straightened the matter out with Minsky and Smith—I believe they were both there—I signed it and said, "O.K., this is agreed; you changed this contract." I just simply kept my copy of the contract.

(5691)

Q. Well, they did change it, didn't they? They gave you a new contract, didn't they?

A. No, they—I assume that they changed—as a matter of fact, I haven't got and you have asked for the final approval. Now, this something that—

Q. Well, didn't they subsequently change the contract?

A. They must have because I paid it off in the form that I understood it.

(5692)

Q. Well, P-13 I show you. Is that for the same motion picture?

A. Yes.

Q. And what is the date of that?

A. The month of January 10.

Q. And does that represent any different terms on there than P-12?

A. Yes. This says 50 per cent the first week.

Q. And what? And then what?

A. Subsequent weeks subject to the sliding scale, which is the deal that I negotiated, which was different than the deal that they had mailed over to me.

Q. But you signed it anyway, the one they mailed over?

A. I signed it after a conference with them in person where they said they would change the contract to my understanding.

Q. Now, were you here when I asked Mr. Goldman whether or not there were ever any motion pictures other than COUNTRY GIRL on which during this period of this suit Goldman Theatres ever offered a guarantee? Maybe you weren't, but I thought you were here. Were you here when I asked him that?

A. I don't remember it directly.

Q. Well, I asked him that, Mr. Beattie, and he said he didn't know of any, that he referred me to you.

Now, could you tell me of any motion picture

(5693)

other than COUNTRY GIRL on which the Goldman Theatres, any of them, ever offered a guarantee during the period of this suit?

A. I don't remember any. There may have been, but I don't remember any.

Q. Well, do you remember answering Interrogatory No. 4.? You have a copy there. Now, you answered that interrogatory, didn't you?

A. Yes.

Q. And you there stated that COUNTRY GIRL was the only one, did you not?

A. Yes. I said, "To the best of my knowledge."

Q. Now, do you have any doubt that there were any others?

A. I don't know. I negotiated on a lot of pictures and—

Q. Well, wouldn't you remember—

A. —bought a lot of them.

Q. Well, wouldn't you remember that you only offered one guarantee during this period? Wouldn't you remember if there were any?

A. I dealt in hundreds of pictures since that time, Mr. Sawyer. I can't remember all of them.

Q. And—

A. Practically maybe thousands. I don't know.

Q. And since then you have been involved in the preparation

(5694)

for testimony in this suit, I take it?

A. I said I don't remember any.

Q. And have you been? You have been in—

A. Yes.

Q. And you have been consulted constantly about matters concerning this suit?

A. Correct.

Q. And you have never come across any indication that you offered a guarantee on any other picture, have you?

A. I don't remember any.

Q. Sir?

A. I don't remember any.

Q. You don't remember whether you came across it or not?

A. I don't remember any guarantees—

Q. Any other than this?

A. —at this time.

Q. Now, without respect to whether or not they were bidding their pictures, as you put it, RKO and Columbia were both splitting their product during this period, were they not?

A. Well, RKO always claimed that they were not splitting pictures. They claimed they sold their pictures or marketed their pictures where they could find what they termed the theatre they wanted or sell them on the—on what they believed would be the best at the moment. I called it a split.

(5695)

They did not call it a split.

Q. Well, they did it themselves, though, didn't they?

A. Yes.

Q. They split their product, didn't they?

A. They said it was not a split and they split themselves.

Q. They did it but they said it wasn't a split?

A. They sold—they said they marketed their pictures and did not call it a split.

Q. But was it in fact a split?

A. I said I call it a split. They termed to call it—they wanted to call it something else.

Q. Well, was it a split?

A. In my opinion, it was split; in their opinion, it was not.

Q. And yet they did it, didn't they?

A. They made any division of product as far as Stanley Warner and ourselves is concerned themselves.

Q. They made a division of their product, did they not, between you and Stanley Warner? They made a division?

A. They said they marketed them between us—

Q. Yes.

A. —or anybody else in town who was interested in them.

Q. And then you—well, anybody else in town was interested; there wasn't anybody else in the split, was there, besides you—

(5696)

A. No, but—

Q. —and Stanley Warner?

A. —we didn't get all the product.

Q. Oh, Mr. Beattie, I assure you that nobody is so attempting.

Now, RKO made two lists, did they?

A. No. RKO wouldn't make two lists. They made—might come in to me and say, "What are your bookings? What can you use? We have certain pictures. We are scouting the market to find out what is—what theatres are available and what time," and they make you—they would make their judgments from that.

Q. Well, make judgments, but how would you know whether or not—what pictures you were going to have—

A. Well, they would try to—

Q. Wait till I finish.

A. —negotiate with me for certain pictures.

Q. And Stanley Warner would not negotiate or seek to license those same pictures; is that right?

A. I assume so.

Q. And RKO did this, didn't they?

A. Yes.

Q. They are the ones who did it?

A. Yes.

Q. And you were asked on deposition, were you not, and you

(5697)

simply stated that RKO split their own product?

A. Correct.

Q. Without any qualification. I mean, they split it.

A. No. That is right.

Q. And how about Columbia? Since you said that they were not in your—as far as you know, your relations with them, they were not bidding their product—I mean, they are not seeking on bids—they were splitting, weren't they?

A. Well, they had much the same thing as RKO had.

Q. Well, who made—

A. They did it—

Q. —the split at Columbia?

A. Well, again, they didn't call it a split. They—they would negotiate with us for pictures or—

Q. Well, what—I wasn't asking you what they called it.

A. —certain product.

Q. I was asking you to tell me who made it, who made the Columbia split.

A. They claimed it wasn't a split.

• • •

(5702)

Q. Now, did you—you bid from time to time using a house allowance or house expense figure, did you not?

A. I have not to my knowledge ever used a house expense figure.

Q. Did you?

A. Not to my knowledge.

Q. Didn't we have a bid here this morning where—wasn't COUNTRY GIRL on that basis?

A. I didn't—I never saw the—the bid on COUNTRY GIRL. I believe I signed the contract, but I have never used house expense figure in any of my bids, any of my negotiations.

Q. You didn't license pictures 90/10 over $5000?

A. I licensed pictures 90/10, but there is a great difference between 90/10 over house expense and house allowance, a wide difference. On one you are purporting that a house allowance is what your house overhead is. On the other you are making a film deal where you think it is the best deal you will offer or what you think is an excellent deal to offer. I have never put down to my knowledge house expense. As a matter of fact, I have changed a number of contracts that read "house expense" and changed them to "house allowance."

Q. And on this—

A. I—I put a great distinction between those two.

Q. And on this were you ever asked to itemize the house expense or house allowance?

(5703)

A. I have had people ask me to itemize house expense and I have told them very frankly that what our house expense was was no concern of theirs. We were giving them a house allowance which was a film deal.

Q. All right. In other words, you used, when you bid 90/10 or—did you ever bid 70/30?

A. Yes.

Q. When you bid these percentage figures, over $5000 at the Midtown or—was that the figures that—

A. Yes.

Q. —over $5000 or $7500 at the Randolph?

A. Yes.

Q. You consider that to be a bidding figure that the distributor could look at and know that that is what came off first; is that right?

A. No, he would have to evaluate his bid based on what I offered him—

Q. Exactly.

A. —as to what he would think he would get in film rental—

Q. Exactly.

A. —from it.

Q. And you consider it that whether—how that figure was made up wasn't germane or pertinent to his problem as to whether he wanted to accept your bid or not, didn't you?

(5704)

A. Well, I—my contention was that I didn't use house allowance as a matter of privacy of our own records or that I wanted to get into anything on house allowance in any way. I tried to, just tried to make a film deal based on film rental to be given to the exhibitor, what I thought was a good deal to offer.

Q. And these were negotiations and not bids, anyway, weren't they?

A. I don't know. Some of them may have been bids. I think COUNTRY GIRL was a bid on a 90/10 deal.

Q. But—

A. There may have been others that I bid on a 90/10 or a 70/30 basis.

And you have told them, haven't you, the distributors, that you wouldn't in any way discuss the makeup of that figure?

A. It wasn't necessary.

Q. Well, that is—

A. I don't know how to explain that.

Q. I agree with you, Mr. Beattie.

A. The house allowance—

Q. I couldn't agree with you more, Mr. Beattie, even I, this one time, that the house figure wasn't necessary.

A. I simply said that it was a film deal.

Q. But I am just asking you, didn't you tell the distributors

(5705)

that? You told them, didn't you, that you just wouldn't discuss it, didn't you, how that figure was made up?

A. This was a deal I was offering them.

• • •

Q. Now, this P-176, Mr. Beattie, and it has information as to grosses and film rentals, and whatnot, all of which are in the case, but I invite your attention to the names of the motion pictures, and I tell you that 176 lists all of the pictures that Viking played.

(5705a)

Now, I would like to ask you if you will look over that list and tell me whether or not you bid or made offers on any of those pictures and, if so, which ones.

A. I believe I offered to negotiate or tried to play or get STUDENT PRINCE. BETRAYED I am not sure of. I don't remember—I think ATHENA was on our split and I think HIT THE DECK and GLASS SLIPPER was.

(5706)

Q. Well, no; I know. I assume that they are on your split. What I was asking you—

A. Well, any picture that was on my split, I am sure I tried to secure. I was trying to buy and book for three theatres and certainly any pictures of any quality I certainly attempted to secure.

Q. All right; your testimony is that whenever any picture on your side of the split you made an attempt to license?

A. Any picture of any quality, and many times without any quality. I had to play them in order to fill our theatres. I believe it was the Goldman Theatre played 52 one-week pictures during the period.

Q. Thank you for giving us that information, Mr. Beattie, but do I understand, then, that you are saying that from your recollection you sought to negotiate for or in some way sought to license every single picture that was on your side of the split?

A. Is—I don't know. I would have to look at the product, but I would say unless the picture was a very bad one, or I would happen to be not in need of a very bad picture at the time, but a quality product, I would say that the pictures that were on my split, I negotiated for, unless some other circumstances entered, which I wouldn't know at this time what you are referring to.

(5707)

Q. And could you tell me any pictures on that list there that the Goldman Theatres made an oral or a written bid for?

A. Well, I would have to—let's see—I believe I tried to secure LUCY GALLANT.

Q. Did you make an oral or a written bid for it?

A. I don't remember which it was, but it may have been an offer of — it may have been a negotiation on it.

Q. Well, did you make an oral or a written bid for it?

A. Not to my knowledge.

Q. And were there any pictures on that list on which the—any of the Goldman Theatres made an oral or a written bid?

A. Well, we have a list here, Mr. Sawyer, of the pictures that we made a written bid for. What other pictures I made an oral offer or bid for I think I have no record of at this moment, nor did I keep a record of such things.

Q. Well, is it not a fact, Mr. Beattie, that you stated in the interrogatory in this case under oath the pictures under which you made either an oral or written bid and isn't it a fact that there isn't a single one of these pictures on this list on which you stated in the interrogatory under oath you made an oral or written bid? Isn't that a fact?

A. As far as an oral or a written bid, I would say that it was included in this list. If it was something else, or an oral bid that I didn't have a record of, I wouldn't know

(5708)

it. I would say that to my knowledge the oral or written bids were on the list that I had on my interrogatory that we have talked about previously.

Q. Very well; now, there isn't a single picture on this list of pictures that played the Viking that you made an oral or written bid, is there, according to what you asked earlier?

A. Well, I would have to check it, Mr. Sawyer. I will

Q. Well, you checked before you filed that and signed it before a Notary Public, didn't you?

A. I would say I would have to check it so as to see if I made any. I would have to check this list against what played the Viking Theatre to see if any pictures that I made a bid on here played the Viking Theatre.

(5709)

Q. Well, you checked before you filed that and signed it before a Notary Public, didn't you?

A. I say I would have to check it to see if I made any —I would have to check this list against what played the Viking Theatre to see if any pictures that I may have bid on here played the Viking Theatre. I see a picture here BABY DOLL, that went to the Viking Theatre.

Q. All right. Now, that played after the period in suit.

Now, is there any picture other than BABY DOLL that played the Viking Theatre, look at the list now, on which you made an oral or a written bid? That is what I am trying to find out.

A. Not to my knowledge at this time.

Q. There isn't. All right.

Now, that list there constitutes, if you take double features as one exhibition, 31 pictures; will you accept that?

We will check that.

Now, did you ever make an oral or a written bid—and you may consult your list of interrogatories there—on the picture HELEN OF TROY?

A. According to this list I did not.

Q. That was on the Stanley Warner split, wasn't it?

A. I don't know.

(5710)

Q. All right. The picture SERENADE.

A. According to this list it is not on there.

Q. And the picture BAD SEED.

A. It is not on this list, sir.

Q. TOWARD THE UNKNOWN, is that on there?

A. Yes, sir.

Q. All right. That is two then, isn't it?

A. Yes.

Q. BABY DOLL AND TOWARD THE UNKNOWN, right?

A. Yes, sir.

Q. GIANT?

A. I don't know, Mr. Sawyer.

Q. Do you remember GIANT?

A. Yes.

Q. That picture?

A. Yes.

Q. It was on the Stanley Warner split, wasn't it?

A. I believe so.

* * *

(5711)

Q. The McCONNELL STORY?

A. I don't see anything on here on the McCONNELL STORY.

Q. No, but I mean you got McCONNELL STORY.

A. I think so.

Q. So you got McCONNELL STORY and TOWARD THE UNKNOWN, right?

A. I believe so.

Q. All right. So we have now that you bid on two and you got two.

Mr. Sawyer: Excuse me. Strike that.

The Witness: I didn't get BABY DOLL.

Mr. Sawyer: No, you didn't. That is right.

By Mr. Sawyer:

Q. But you bid on BABY DOLL and TOWARD THE UNKNOWN and you

(5712)

got TOWARD THE UNKNOWN. And we also find that you had gotten SERENADE and the ones I have read you so far, and McCONNELL STORY, is that correct?

A. I believe so.

Q. Now, PETE KELLY'S BLUES, did you make a bid, oral or written, on that?

A. No, I don't believe so.

Q. And how about BLOOD ALLEY?

A. Not to my knowledge.

Q. How about STRANGE LADY IN TOWN?

A. It is not on this list.

Q. How about THE TEAHOUSE OF THE AUGUST MOON?

Mr. Sawyer: No, strike that.

By Mr. Sawyer:

Q. GUYS AND DOLLS?

A. GUYS AND DOLLS? No, it is not on this list.

Q. TEA AND SYMPATHY?

A. TEA AND SYMPATHY is on here.

Q. Yes. Now, you bid on that, didn't you?

A. Yes.

Q. You got it?

A. Well, it was bid first, and rejected, and rebid again and we got it.

Q. All right. To save time, may we accept subject to check,

(5713)

Mr. Beattie, I might ask you without going through each one of these motion pictures by name, whether you would accept subject to check—

Mr. Sawyer: Will Your Honor indulge me one moment? We can probably save time with Mr. Beattie and he will be off the stand this afternoon.

By Mr. Sawyer:

Q. Well, I think from your list, Mr. Beattie, I can ask you this: That taking out HOLLYWOOD OR BUST and THREE VIOLENT PEOPLE, at the bottom, because they are outside the period of this suit, your counsel accepts that, during the whole period you made an oral or a written bid on 11 pictures; is that correct?

A. Well, that would be subject to check.

Q. Well, that you can check right in front of you. That is correct, isn't it, 11 pictures?

A. 12, not including the two Paramounts.

Q. Well, that is the same picture, isn't it? Oh, I see.

A. When I say the two Paramounts, COUNTRY GIRL AND CATCH A THIEF.

Q. All right, that is 12, and then you are carrying this picture here by Allied Artists? Please don't count that, that is a non-defendant.

A. No, I didn't—I am counting BABY DOLL as 11. As a

(5714)

matter of fact, on your paper there is 11 alongside of BABY DOLL here.

Q. All right, 11.

A. I am counting TEA AND SYMPATHY twice.

Q. O.K. It is 11. And then you add to that COUNTRY GIRL and TO CATCH A THIEF.

A. Yes.

Q. All right, that makes it 13. Then will you accept that you got 9 out of the 13?

A. Yes, sir, from this list.

Q. And you don't have any reason to doubt the list, do you?

A. No other than the oral bids, which I wouldn't remember or have a record of, if I made any such oral bids.

* * *

(5716)

THIRTY-THIRD DAY

* * *

(5718)

GEORGE T. BEATTIE, recalled.

DIRECT EXAMINATION (Continued)

By Mr. Sawyer:

Q. Mr. Beattie, may I ask you some questions with reference to the motion pictures which the Viking Theatre sought to license, pictures out of those pictures that your theatres played.

Now, on the pictures of Loew's, Mr. Beattie, did your theatre seek to license the picture GUYS AND DOLLS?

A. Yes, sir. We played it.

Q. You played that picture, did you not?

A. Yes.

Q. Do you recall that that picture had a national film rental of $6.8 million?

A. I don't remember the exact figures.

Q. It was a big picture, was it not?

A. Yes, sir.

(5719)

Q. Did you seek to license the motion picture TEA AND SYMPATHY?

A. Yes.

Q. Did you play it?

A. Yes.

Q. Are there any other motion pictures of Loew's—maybe you can look at your list, if you wish—on which the Goldman Theatres made a bid, either oral or written; do you know of any others?

A. The only one I believe I remember at this time, I think it was BRIGADOON.

Q. You didn't make a bid for that, did you, sir?

A. Well, I don't know. As I remember it, I think we made an oral bid of some kind, but I don't remember the circumstances. I believe—

Q. That is one that you would like to add to the answers to interrogatories that you filed previously?

A. Well, I have no way of confirming this, because I did not keep a record of oral bids, and my memory is that I made an oral bid on it. Perhaps it could be confirmed by Metro, I don't know.

Q. Your recollection now is, although it wasn't at that time, that you did make an oral bid for that picture?

A. As I remember it, yes.

(5720)

Q. All right, we will accept that, and add it on.

(At the blackboard) That is three on which you sought to license or make a bid, that is, GUYS AND DOLLS, TEA AND SYMPATHY, and BRIGADOON.

A. Well, I sought to license all the Metro product I could get.

Q. You see, we are confining ourselves to just these particular pictures. The 87.

A. I see.

Q. And you got two.

A. Yes.

Q. With respect to the distributor Warner Brothers, Mr. Beattie—

A. Mr. Sawyer—

Q. Go ahead.

A. Are you speaking of the pictures in the 87?

Q. Yes.

A. Pictures that played?

Q. Yes.

A. I believe there were other pictures we sought to license. We may not have made a bid, but we certainly sought to license.

Q. I am speaking of pictures which you played or on which you made a bid, either oral or written. That is what I am confining myself to.

(5721)

Mr. Nizer: Not negotiation?

The Witness: Not negotiation?

By Mr. Sawyer:

Q. Well, unless you got the picture.

A. Well, I may have tried to negotiate for the picture without orally bidding or formally bidding.

Q. I understand that. I am asking about the pictures on which you either made an oral or a written bid or pictures which you actually got and played at your theatres.

A. And no negotiations?

Q. That is right, unless you got the picture.

A. All right.

Q. On the picture BATTLE CRY, for instance, you sought to license that in some fashion, did you not?

A. Yes.

Q. You played the picture?

A. Yes.

Q. And that picture was over seven million dollars in national film rental, was it not?

A. I have forgotten the figure.

Q. A big motion picture?

A. Yes.

Q. And the picture EAST OF EDEN?
A. Yes.

(5722)

Q. You played that picture as a result of negotiations?
A. Yes.
Q. And the picture SERENADE?
A. Yes.
Q. And the motion picture TOWARD THE UNKOWN?
A. Yes.
Q. That played at the Goldman Theatre, did it not?
A. I believe it did.
Q. And THE McCONNELL STORY?
A. Yes.
Q. These are all Warner Brothers pictures?
A. Yes.
Q. PETE KELLY'S BLUES?
A. Yes.
Q. How about BABY DOLL?
A. BABY DOLL I believe we bid on and it was won by the Viking.
Q. It went to the Viking, did it not?
A. Yes.
Q. These are the numbers—

Mr. Goffman: Your Honor, I object to the inclusion of BATTLE CRY or EAST OF EDEN in this computation, because they were not among the 87 pictures on which the Viking made an offer.

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(5728)

The Court: I agree. I will sustain the objection.

Mr. Sawyer: Your Honor, could I read to you from the interrogatories?

The Court: No, I think it adheres to my ruling and I will adhere to it.

Mr. Sawyer: What Mr. Goffman was reading, Your Honor, was that you said here: I have added as to availability and change of playing time, and as to those two, that is 8 and 9—you remember when we had the list of numbers—as to availability and change of playing time, and as to those two my ruling is the same, that all testimony

(5729)

as to those two, that is availability and change of playing time, should be limited to the pictures sought by the Viking.

Well, very well, Your Honor, that refers to my offers numbered 8 and 9 in the oral argument, advertising and so on, my offer to show changes of availability by distributors in favor of defendant exhibitors on all other pictures altogether, of the pictures totally outside, and the same thing with changes of playing time, and there, Your Honor, quite consistently, said: No; as to availability and change of playing time, only pictures sought by the Viking. Now, this is a picture sought by the Viking. It didn't make a written bid on it, Your Honor, because of this change, but it is within this, it is a picture. We have an interrogatory here, an answer to request for admissions, which says that they advised Herman Comer of a certain availability for BATTLE CRY, and that was later changed. We have testimony from Mr. Wren that they were interested in that picture.

This ruling here is with respect to these availability changes on other pictures altogether, outside of any that we had any evidence on, outside of any that we presented or had complaints about specifically by name.

That is what this ruling here means I am quite sure, Your Honor, and there has been certainly evidence here to show that this would meet Your Honor's ruling

(5730)

because this was sought by the Viking.

Mr. Goffman: Your Honor, I think the position has been made clear that when Mr. Sawyer is making comparisons with this witness he is doing it as to pictures on which the Viking made an offer, and whatever inference he wants to draw from that he may, but he cannot make it with respect to those on which the Viking has not made an offer.

Mr. Sawyer: The testimony that Your Honor permitted—

The Court: Well, I have ruled.

Mr. Sawyer: All right, sir.

(At the blackboard)

Now we will reduce these seven here to five.

By Mr. Sawyer:

Q. You got four of those, that is, the Warner Brothers pictures, and BABY DOLL was one that you did not get.

• • •

(5732)

Q. Now, you sought no pictures of Fox in the 87, is that correct?

A. I believe that is correct.

Q. (At the blackboard) So that is sought none, therefore got none.

A. Yes.

Q. Now, with respect to Columbia, did one of your theatres play CAINE MUTINY?

A. Yes, sir.

Q. You know that?

(5733)

A. Yes, sir.

Q. And the picture PICNIC?

A. Yes, sir.

Q. And I would take it that you would agree that those two pictures are the only—that there are no other pictures other than those two on which you made an oral or a written bid?

A. To my knowledge I have stated that, Mr. Sawyer, but I don t know—I have no records of oral bids, nor do I—

* * *

(5734)

Q. And in the case of Universal, did you play any Universal pictures out of these 87, do you know?

I tell you that in the 87 there are none which the Goldman Theatres played. Subject to check would you accept that?

A. Yes, that is O. K.

Q. Also would you agree that there were none on which you made an oral or a written bid? This is Universal.

A. Well, that would be subject to check also. To my knowledge there are none.

Q. Now this is Paramount. On Paramount I think we can agree that one of your theatres played DESPERATE HOURS?

A. Yes.

Q. And you played TEN COMMANDMENTS?

A. Yes.

Q. And you played BRIDGES OF TOKO-RI?

A. Is TEN COMMANDMENTS one of the 87?

(5735)

Q. Well, it is unless we have an argument about it.

Mr. Nizer: No, TEN COMMANDMENTS is not in the 87.

Mr. Sawyer: Is there an objection then?

Mr. Nizer: Of course. It isn't in the 87. I thought you were confining yourself to the 87.

Mr. Sawyer: I am confining myself, Your Honor, according to Mr. Goffman saying pictures which we sought. Now, I don't take it there is any disagreement that we sought TEN COMMANDMENTS.

Mr. Rome: There has never been any suggestion of any grievance with regard to TEN COMMANDMENTS.

Mr. Sawyer: Well, since it was the largest motion picture in all time, I guess we would have liked to have had it. There is no question, I take it, that we sought to get it.

Mr. Rome: Mr. Wren himself on the stand has earlier said that the criteria considered by the distributor of the motion picture were perfectly valid and therefore the judgment of the distributor was a valid business judgment.

Mr. Sawyer: No.

Mr. Nizer: That was the testimony.

Mr. Sawyer: No, sir. That is the time where the gentleman came down and said that he was looking for a

(5736)

theatre of about 1500 seats and he talked to Mr. Wren in front of the Viking Theatre. That was when he said the Goldman was in his mind and Mr. Wren pointed out that that didn't have 1500 seats. That was the testimony about TEN COMMANDMENTS.

The Viking wanted TEN COMMANDMENTS. The picture was not a bid picture as far as I know for

anybody, but they came to see us and we wanted to play it. Now, if it is not a picture where any bids are being asked for for anybody and it is to be negotiated with everybody, I don't see how we can be precluded from including it just because we made no specific bid for it when the evidence from both sides is that we were interested in it and sought to license it and wanted the picture and actually had discussion with the representative. I think that one certainly is in, Your Honor.

Mr. Nizer: Your Honor, this is the picture on which due to its very special character Mr. Wren conceded, aside from other concessions, that the distributor Paramount had a right to select any theatre of its choosing for this very special production and that he was not making any claim that it didn't have that right and could select any theatre for this very extraordinary picture.

I read from 1942 just one—there is a long series of answers to the same effect—

(5737)

> Q. Now, you recognize, Mr. Wren, or don't you, the right of a distributor owning a property like TEN COMMANDMENTS, costing $13 million at least to produce, bearing the risk of recovering this huge investment, to choose any theatre it pleased which would be most suitable for that particular production; you recognize that, don't you?
>
> A. Yes, sir.

And many other such admissions. To say that this remains a claim because he had some problem on screening or something or other, whatever it was, is simply to fly in the face of the admissions of the plaintiff himself. This is not one of the 87 on which any grievance is asserted.

Mr. Sawyer: Your Honor, that isn't an admission of anything. He puts the proposition to a witness, "Does the distributor of this picture have a right to choose the theatre which is most suitable?" Well, of course. I mean, the question answers itself. What is Mr. Wren supposed to say, no, he doesn't have a right to choose the theatre which is most suitable? That isn't the gist of it at all.

The same thing with any one of these motion pictures. Maybe in an individual instance a distributor made a good judgment in good faith and maybe he didn't, but we are talking about whether or not it is permissible to include

(5738)

this in this comparison. They made a comparison of how many we sought and how many we got. I am doing the same thing now with the Goldman Theatres, and it is a picture that the Viking sought to license. The Viking wanted to get TEN COMMANDMENTS, it had discussions to get it and therefore it is certainly within Your Honor's ruling.

Mr. Nizer: Your Honor, Mr. Sawyer prepared a list of the 87 pictures. This is in his own handwriting or his associate's. I hold it here. THE TEN COMMANDMENTS is not on it. He did not list it among the 87 on his own list.

Mr. Sawyer: Because, Your Honor—

Mr. Nizer: I don't understand "because." How can you make your list of 87 omit it and then urge upon the Court the fact that it should be there when you haven't put it on?

Mr. Sawyer: Your Honor, the 87 is where we had specific terms offered when we were making the comparisons of those we didn't get where you have speci-

fic terms. There is nothing about this 87, that list, that commits me to say that there are no other pictures that we wish to get. We sought to get and license TEN COMMANDMENTS, Your Honor, and I think that is uncontroverted in the testimony, and if we did it is within Your Honor's ruling.

The Court: Sustained.

(5739)

By Mr. Sawyer:

Q. Now, you played COUNTRY GIRL, of course?

A. Yes.

Q. You played BIRDS AND BEES?

A. Yes.

Q. You played THAT CERTAIN FEELING?

A. I believe so.

Q. And THE COURT JESTER?

A. Yes.

Q. That is seven motion pictures. Again would your answer be the same, that you know of no others on which you made an oral or written bid?

A. Yes.

Mr. Nizer: And you are excluding negotiations?

Mr. Sawyer: Except for those pictures that he got.

Mr. Nizer: I don't understand that, Your Honor.

By Mr. Sawyer:

Q. Now, in the case of United Artists, I understand that you would agree with me that you played BARE-FOOT CONTESSA?

A. Yes.

Q. SUMMERTIME?

A. Yes.

(5740)

Q. And THE BACHELOR'S DAUGHTER?

A. Yes.

Q. Would you agree that there are no other motion pictures produced by United Artists on which you made an oral or a written offer?

A. I would not agree to that. As far as I know there are none.

* * *

(5741)

Q. Were there weeks in which you spent on entertainment and pursuant to your company's business less than that amount of the allowance?

A. There may have been weeks more, there may have been weeks less.

Q. Did you keep an account to find out, to see whether or not at the end of the year you had spent more or less than the amount of the allowance?

A. No, I did not.

Q. Did you keep any record or accounting whatsoever of for

(5742)

what you spent that money?

A. No, I haven't.

Q. And you never did?

A. Roughly for income tax purposes, which I would dispose of when it was approved.

Q. Oh, you did keep a record then for income tax?

A. Well, I say roughly. No names or dates. It would be an amount on the year or on the month or on the week. But I kept no record as to where, who with and what.

* * *

(5744)

Q. Now, Mr. Beattie, I show you what has been marked as Plaintiff's Exhibit 75. I will ask you what that is.

A. That is an application contract for SUMMERTIME for the Randolph Theatre.

Q. Did that document form the license contract under which the picture was sold to the Randolph Theatre?

A. Yes.

Q. What is the date of that contract?

A. July 19, '55.

Q. Under that contract when is the motion picture SUMMERTIME to open?

A. I don't see a date on this contract for opening.

Q. How many weeks is the picture to play?

A. Eight weeks.

Q. May I see it for a minute?

Eight weeks.

(5745)

Now, how long did the Randolph exhibit that picture with its eight-week commitment?

A. I believe it played four.

Q. When you took that picture off you did it on the decision of Goldman Theatres alone, did you not?

A. Yes.

Q. Do you recall what the availability was of that picture in the bid application?

A. No, I do not.

Q. I show you a bid application for SUMMERTIME from United Artists and ask you if it gives an availability date there.

A. Available August 3, '55.

Q. Now, having signed the contract on SUMMERTIME were you intending to play it on availability?

A. Well, I don't know that. I would have to see when we opened the picture. I would assume that it opened on availability.

Q. You did play it, did you not, approximately on availability?

A. I believe our date was the first part of August.

Q. On July 15, just three days after this contract, you licensed the motion picture McCONNELL STORY, did you not?

(5746)

A. McCONNELL STORY? I don't know when the license date was on McCONNELL STORY.

Q. I will show it to you. This document has been marked P-36.

The 15th was the bid due date.

You signed for the McCONNELL STORY here I see, according to P-36, on September 7.

A. Yes.

Q. If you had played SUMMERTIME for the length of time which you agreed to in your contract you couldn't have opened McCONNELL STORY on availability, is that correct?

A. Well, McCONNELL STORY was apparently bought, according to this, after we had made our determination on SUMMERTIME.

Q. But you didn't sign the contract on McCONNELL STORY until eight days after it opened, is that correct?

A. I don't know when it opened but I assume from this that it was signed after—the contract was dated after it opened.

Q. Didn't the McCONNELL STORY have an availability of August 25?

A. I don't know at this point what it had. I believe it played somewhere the latter part of August, over Labor Day, as I remember it.

Q. Well, would you accept that as its availability date?

(5747)

Mr. Rome: Your Honor, I would object to any further questions here and would bring to Your Honor's attention the fact that during Mr. Wren's examination at page 3942 of the notes he actually stated the following under questioning by Mr. Nizer:

Q. You have already agreed, haven't you, that it was a resonable business exercise of judgment?

A. Yes, sir.

Q. Which you yourself would have made if you were United Artists, to turn down the Viking Theatre under the circumstances, right?

A. Yes, sir. I have said that, yes, sir. This having to do with the motion picture film SUMMERTIME, and Mr. Wren's testimony being unequivocal that if he had been the United Artists branch manager he would have turned down the offer for SUMMERTIME. I submit to Your Honor that this entire line of questioning is quite irrelevant.

Mr. Sawyer: On the basis, Your Honor, of the eight-week commitment to the Goldman Theatres which they didn't live up to.

Mr. Rome: No, this had to do with the availability, sir.

Mr. Sawyer: All right, availability. That is again what I am showing, availability of motion pictures.

(5748)

The Court: Overruled.

By Mr. Sawyer:

Q. So that at the time you licensed SUMMERTIME, you committed yourself for eight weeks, is that correct, Mr. Beattie?

A. It was negotiated for eight weeks.

Q. But the contract is a commitment, isn't it?

A. The contract, we negotiated a deal for eight weeks.

Q. That is what the contract says, eight weeks, does it not?

A. Right.

Q. And that picture was pulled by you after four weeks, was it not?

A. That is correct.

Q. In order to play THE McCONNELL STORY approximately on availability?

A. I don't believe it was pulled in order to play McCONNELL STORY.

Q. Well, McCONNELL STORY followed it, didn't it?

A. THE McCONNELL STORY followed it but it was taken out because it wasn't doing business.

Q. Well, your commitment nevertheless was for eight weeks, wasn't it, doing business or not?

A. Well, it is no different a commitment than Mr. Sley had when he pulled a picture off when it hit a holdover figure.

(5749)

The picture wasn't doing business.

Q. Mr. Beattie, it is not your function to talk about what Mr. Sley did even though you have been here in the courtroom and I understand you have heard all this evidence for all these weeks. I ask you, Mr. Beattie, whether the picture was earning or wasn't earning, you pulled it after four weeks?

A. Correct.

Q. On an eight-week commitment.

A. Correct.

Q. That was a violation of your contract, was it not?

A. Yes, it was.

Q. All right. Then you put in McCONNELL STORY, did you not?

A. Yes.

Q. And you put in McCONNELL STORY on August 25?

A. I will accept the date if you say that is when it is. I don't know what the date is.

Mr. Rome: No, August 30, Mr. Sawyer.

Mr. Sawyer: August 30, very well.

By Mr. Sawyer:

Q. You didn't even sign a contract for McCONNELL STORY until September 7, according to that, is that correct?

A. That is possible. It is frequently that you negotiate a deal some time in advance and the contracts aren't mailed

(5750)

to you until some time thereafter.

Q. Is that frequent with the Goldman Theatres that you open motion pictures before you have actually signed a contract for them?

A. When you make an agreement on a negotiated deal you frequently have contracts mailed to you some time after your negotiations.

Q. All right. It is frequent then you say?

A. It happens frequently in the business.

Q. Well, I am not speaking of the business.

A. It is not just with me. It is a matter that is in the business generally.

Q. Not in the business, Mr. Beattie. I have not qualified you or put you on the stand to qualify you as an expert in the motion picture business. Now, you are called to testify about the practices of the William Goldman theatres, if you will.

Mr. Rome: The witness is also entitled in his answer, sir, to make whatever explanation he feels appropriate and pertinent to the subject matter, and he has said that this is something that happens frequently in the business.

Mr. Sawyer: Which this witness, Your Honor, is not competent to answer.

(5751)

Mr. Rome: It has been shown that he has been in the business, sir, for over 30 years.

The Court: Proceed.

By Mr. Sawyer:

Q. Now, with respect to the William Goldman theatres, it is frequent, is that your testimony, that you open

motion pictures—and I am only speaking of motion pictures from these distributors now—before you have signed a binding contract specifying the terms? You have testified that is a frequent practice, is it?

A. I wouldn't say that we have contracts signed frequently after the picture opens. I said we have contracts that are signed several days or weeks after the negotiation.

Q. Well, I am speaking—

A. In this particular instance I believe this would happen here because we probably put in McCONNELL STORY after, fast after we decided to take out SUMMER-TIME.

Q. Well, you testified, did you not, when I first pointed out to you that the contract wasn't signed until after the picture opened, that that was not uncommon?

A. It is not uncommon to have a contract signed several days—I don't think, I think it would be uncommon —maybe I misunderstood you—to have a contract signed after the picture opens, but this contract was apparently negotiated

(5752)

close to the opening date.

Q. That is what you testified though originally, wasn't it, this morning, just a few minutes ago?

A. I said I thought I misunderstood, I think I misunderstood your question.

Q. You are now saying that that is not common, to have the contract signed after the picture opened?

A. I would have to check contracts and negotiations and so forth. They frequently come in a week, two weeks maybe after you have negotiated a deal and it may happen that they may be after you are playing the picture. I wouldn't say it was common.

Q. That may happen, though?

A. Yes, it may happen after you open the picture.

Q. And you know to your own knowledge that it has happened in other instances with reference to the William Goldman theatres, isn't that correct?

A. It is possible; it is possible it has happened.

(5753)

Q. Now, Mr. Beattie, the Randolph Theatre has two balconies, does it not?

A. No.

Q. It doesn't?

A. No.

Q. Well, you tell me what it has.

A. It has one balcony.

Q. Well, what else does it have besides the downstairs?

A. It has the one straight balcony that goes back up with—with loges and the seats in back of where you enter the balcony of the theatre.

Q. Yes; and is that one balcony into two sections?

A. There is a ramp where you walk through; yes.

Q. And how many seats are there in the—in that balcony, the whole business?

A. I—I would have to see my figures in the—in the —on that. I haven't—I know I haven't—I don't believe I have them with me.

Mr. Sawyer: Well, do we have that?

The Witness: I believe it has been filed inthe case.

Mr. Rome: We stipulated that earlier.

Mr. Sawyer: Yes. I know where it is.

The Witness: I think it was stipulated. I

(5754)

haven't—I wouldn't—

Mr. Sawyer: I know where it is.

By Mr. Sawyer:

Q. Well, we accept your—you will agree with me, won't you, Mr. Beattie, that it is more than a thousand seats?

A. I think it is around a thousand seats.

Q. And do you consider that those seats are less desirable than the downstairs seats?

A. As a matter of fact, there is seats in the balcony that I prefer and many people prefer to downstairs.

Q. Is that why you charge less for them on a hard ticket?

A. We don't—do we charge less for them on a hard ticket?

Q. Yes.

A. The loge seats and the balcony I think are a preferable spot.

Q. Is that why you charge less for them on a hard ticket?

A. Did we charge less for all of them?

Q. Yes; you did.

A. I don't know whether we did or not.

Q. Yes; you did.

A. I think the loge seats were the same price as downstairs.

Q. Mr. Beattie, don't you know, for instance, that in TEN COMMANDMENTS you charged less for the balcony seats than you

(5755)

did your downstairs seats?

A. I said the loge seats and the balcony I believe were sold at the same price as downstairs.

Q. The loge or the balcony?

A. The loge which is in the balcony. The balcony to me is a structure—

Q. Yes.

A. —of a theatre, which is one balcony.

Q. And didn't you charge two—didn't you charge 2.40 for the downstairs seats for TEN COMMANDMENTS?

A. This was Paramount's decision. They wanted—

Q. Oh, Mr. Beattie, I don't ask you whose decission it was; I am trying to get the point: Did you charge less for those seats?

A. I believe we did.

• • •

(5757)

Q. Did you play the motion picture AWAY ALL BOATS, Mr. Beattie?

A. Yes.

Q. And—

Mr. Ward: I—

Mr. Rome: I object to that, sir, as not being one of the 87 pictures as your Honor has limited the testimony.

• • •

(5763)

The Court: Sustained.

• • •

(5764)

CROSS-EXAMINATION

By Mr. Rome:

Q. Mr. Beattie, Mr. Sawyer has put these figures on the board. Do those figures include the pictures as to which you may have sought to license via negotiation?

A. No. They do not.

Q. Were there such pictures that you sought to license by negotiation?

A. Many.

Q. Were there pictures that you sought to license by negotiation which you did not actually succeed in licensing?

A. A number of pictures we sought to obtain, many good pictures we sought to obtain we lost through negotiation.

Q. Which you did not succeed in licensing?

A. Which we did not succeed in licensing.

• • •

(5765)

Q. How many theatres of the William Goldman Corporation are included as having played, those 19 pictures that are there?

A. Three.

Q. So that the 19 pictures played among three theatres?

A. Correct.

Q. Mr. Beattie, how long have you been with William Goldman Theatres, Incorporated?

A. 15 years, since he first opened the Goldman Theatre.

Q. And what is your job?

A. Film buyer and purchasing agent.

Q. Was that your job during the period of July, 1954 to November, 1956?

A. Yes.

Q. Does Mr. Goldman and did Mr. Goldman himself have anything to do with the buying and booking of pictures during that period of time?

A. No. On very rare occasions that I know of, possibly COUNTRY GIRL, and it is the only one I can think of at this moment that he had any hand in negotiating for or—

Q. Other than that one instance you were the man who actually takes charge of the buying and booking of films for the three Goldman theatres?

(5766)

A. That is correct.

Q. In connection with the buying and licensing of motion pictures, have you any right to a film arising out of the fact of the split that has been talked about here?

A. No. As a matter of fact, all the pictures that play any other theatres in town, they have to come off somebody's split, mine or Stanley Warner's. We have no—any right to any of them in any way. They are subject to—they are subject to other distributors—

Q. Does—

A. —and exhibitors in town.

Q. Does the fact of the split make available to you any knowledge or information which is not equally available to any other exhibitor?

A. None.

Q. Are all films on the split?

A. No. There have been a number of pictures that are not on the split or have been put on the split.

Q. Does the fact of the split mean that you actually have to license the pictures that appear on your side of the split?

A. Not at all.

Q. Does it mean that Stanley has to license the pictures that appear on its side of the split?

A. No, sir.

(5767)

Mr. Sawyer: Objected to. He wouldn't know.

The Witness: I am sure they didn't.

The Court: Overruled.

The Witness: I am sure they did not license all of them.

By Mr. Rome:

Q. Have you, in fact, licensed for the three Goldman theatres all of the films that appeared on the Goldman side of the split?

A. No. We have not licensed all the pictures that appeared on our side of the split.

Q. Is there any identity of practice or procedure by the distributors with regard to the split or has that varied in any way?

A. No, most of the distributors vary. They, each one, handles pictures differently in all—in splits, in—in setting up the pictures, or whether they are going to be on the split or not. They change. They are all much different.

Q. Were the pictures of Twentieth Century-Fox on the split?

A. No.

Q. Has the fact of the split anything to do with whether or not a particular film will be put up for bidding or for negotiation?

A. No. It has nothing to do with the—the problem of

(5768)

buying it.

Q. Does the fact that a picture is on the split have anything to do with whether or not a guarantee is offered for it in connection with bidding or negotiation?

A. The split has nothing to do with obtaining a picture in any way, either through buying it or not buying it. It is simply there.

Q. Does the fact of the split in any way determine or indicate the terms by which a particular picture will be licensed,—

A. No.

Q. —whether sliding scale or other terms?

A. No; there is no terms, nothing connected with it with respect to prices.

Q. Who is it actually who decides whether a picture will be put up for bidding or for negotiation?

A. The distributor decides whether it will be put up for bidding or negotiation.

Q. Have you anything to do with the determination by the distributor of its sales policy as to whether a film will be bid for or negotiated for?

A. No.

Q. If a film is actually put up for bidding, is there any obligation on your part or the part of any exhibitor to bid for that particular picture?

(5769)

A. None at all.

Q. If a film is put up for negotiation, is there any obligation on your part or the part of any exhibitor to negotiate for the film?

A. No; there is not.

Q. What is the meaning, Mr. Beattie, of the phrase in the industry, "Passing up a picture"?

A. It means that you are not going to buy it you are—or play it.

Q. What happens if a picture is put up for bidding, let us say, and you or any other exhibitor chooses not to bid for it?

A. Frequently it would not have a first run and would go off into what is known as the keys or the first sub-run theatres.

Q. Would that happen if some other exhibitor were, in fact, interested in the film?

A. If somebody were interested in it, I am sure it could be sold to the other people who were—needed it or could use it or wanted it.

Q. Now, it has been testified here, Mr. Beattie, that for a period of time William Goldman Theatres, Incorporated, generally followed a policy of not bidding for pictures. You are familiar with that situation?

A. Yes; I am. We for a time followed that policy.

(5770)

Q. Now, was that a policy that to your knowledge was

equally available to any other exhibitor who chose to pursue it?

A. Nobody had to bid or negotiate for any picture at any time. This was a policy that any exhibitor could adopt any place in the country.

Q. Did you do anything which in any way interfered with the Viking or any other exhibitor from following whatever policy it chose to pursue?

A. Nothing.

Q. In so far as submitting a bid is concerned and the terms of a bid, who decides what you will submit by way of your terms of bid?

A. It is usually done with people in the organization. We discuss it and decide what terms we shall give, if it is on—if it is on a bid; if it is on negotiation, I usually do the negotiating alone.

Q. Now, in either event, does anybody outside of your organization have anything to do with determining the terms that will be submitted?

A. No.

Q. From your experience in the industry—incidentally, Mr. Beattie, how many years in all have you been involved in the motion picture industry?

(5771)

A. 35 years.

Q. Now, on the basis of your experience in the motion picture industry, what is the significance of a guarantee?

A. A guarantee is when you—as I use it in the business and as I think it is used in the business, is when you put up money or a guarantee of money on a picture.

Q. Now, is a guarantee of any particular significance with regard to the offer on bid or negotiation on a particular film.

Mr. Sawyer: Objected to, Your Honor, as calling for a conclusion from the witness as to whether it

has significance or not. In the first place, he is not testifying as a distributor.

The Court: Overruled.

The Witness: It depends on the picture. It doesn't have any significance, I don't believe, if you have—if there is a picture that has great potential and the guarantee doesn't come close to getting what would be the potential of the picture in the distributor's opinion.

By Mr. Rome:

Q. Now, Mr. Sawyer inquired of you whether it wasn't a fact that the $75,000 guarantee offered by Mr. Goldman in connection with his bid on COUNTRY GIRL was not the only one during the period involved. What has been the practice of

(5772)

William Goldman Theatres, Incorporated, in so far as guarantees are concerned?

A. We did not give guarantees as a practice.

Q. Why was that?

A. We felt that guarantees had a—bidding and putting up guarantees had a tendency to—to raise film rental, cost of pictures, cost of operation. We felt that it was in our judgment better not to put up guarantees, if possible, or not bid if it could be avoided.

(5773)

Q. Do you recall in connection with COUNTRY GIRL and your guarantee of $75,000 what the actual film rental earned was?

A. I don't remember the exact amount, but I think it was around $150,000.

Is that correct?

• • •

Q. Mr. Beattie, just before the recess we are talking about the matter of guarantees, of whether or not William Goldman Theatres, Incorporated, has offered guarantees, and I was talking about why it has not offered guarantees, other than the ones that was mentioned concerning COUNTRY GIRL; why is that?

A. We felt that our theatres were our guarantee.

Mr. Sawyer: Your Honor, I think that question was asked and answered. The question was asked and he

(5774)

stated because it tended to force up the amount of film rental. So it is being asked again, I believe.

The Court: Overruled.

Mr. Rome: You may answer, sir.

The Witness: We felt that our theatres were our guarantees, our organization, showmanship, which we believe we have acquired over the years.

We felt that we had established theatres in locations that were the prime locations in the city for all theatres.

We believed we were the best operators.

We had new theatres in town. As a matter of fact, in 1950, when most of the business was afraid to move ahead, William Goldman went ahead with the Randolph Theatre and remodeled it completely, and in 1951 he did the same thing with the Midtown.

We felt with this, in the industry, and with the record we had shown in all these theatres through time it was not necessary to put up guarantees. We believed our record was our performance.

By Mr. Rome:

Q. You have used the word "showmanship," Mr. Beattie. What is included within your use of that word? What do you mean

(5775)

by "showmanship"?

A. Showmanship encompasses many things. I think it deals more with the selling of a picture to the public.

We have meetings regularly in our organization on advertising, which I think deals with showmanship more directly.

We meet twice a week on campaigns that are put out by a distributor, or a suggested campaign, or the campaign for the picture, and we try to improve on it. We have all our men, Mr. Vanett, Mr. Elicker, Schuyler, Beattie, William Goldman, Lyle Trenchard. I would say that in this group there are probably a couple of hundred years of experience in this business.

We discuss the approaches on advertising as far as the public is concerned, and many times on the advertising of a picture it can turn on a slogan, or it can turn on the way the art goes out on a picture, what it implies.

Frequently you may feel that you have to get something to spark the public on many pictures to get them to come to your theatre. It may turn on any one of these things.

This is what we try to do to increase the business on the picture and in doing so earn the highest film

(5776)

dollar for the distributor.

Many things. There are tie-ups with radio stations, or television will be used, or whether you will use many gimmicks which you will try to do on a particular picture that you think it adapts itself to.

Q. Have the ideas or plans of campaigns that have been evolved by your organization ever been utilized by others?

A. Yes, as a matter of fact, we have had several campaigns that we have developed, other than those given

out of a press book—a press book, to explain to the jury and to the judge, is a campaign that they make up with the different size ads and suggested approaches to the public.

Q. "They" meaning the distributors?

A. The distributors.

For instance, we frequently made, apart from those, believing that their campaign was not the one that will get the most money for the picture of the highest gross—on some occasions our campaigns have been adopted by the distributor nationally.

• • •

(5777)

Q. I was asking you, Mr. Beattie, whether you have charged the distributors on those instances when you have made your newly evolved advertising campaigns available to them?

A. No, the opposite, we were glad to have them use them.

Q. Reference has been made in the course of the testimony to the film of the COUNTRY GIRL, have you any knowledge, Mr. Beattie, of how it came about that that film opened in your Midtown Theatre on February 1 rather than the February 9th date?

(5778)

A. It was felt by us that—

Q. First, have you personal knowledge of how this came about?

A. Yes, sir.

Q. How?

A. It was felt that due to the television show of the nominations of the Academy Awards being, I believe, on the 12th, that it would be beneficial to the picture to open it a week prior to the Academy nominations, thereby trying to get a good gross on the picture that particular week, then the week of the nominations also doing big business, and then after the nominations, because of the nomina-

tions, if she got the nomination, it would increase the business there.

As a matter of fact, our judgment was sustained. The picture held up very well for the first three weeks and that was one of the reasons for doing it.

Q. Was this done with the knowledge and approval of Paramount?

A. Yes, it was.

Q. Reference has been made to the film SUMMERTIME, which played in the Randolph Theatre. Do you recall that testimony?

A. Yes, sir.

Q. How did it come about that that picture played only four weeks rather than the eight weeks which was the subject of

(5779)

your contract?

A. Well, we had very high hopes of SUMMERTIME. We thought it was a very fine picture. As it turned out, the picture did not do well at all in comparison to what the distributors and the producers and ourselves had hoped it would.

As a matter of fact, at first—

Q. Do you recall what its national film rental was?

A. I believe its national film rental was only one million four, and the first week it grossed around twenty-three I believe, and then dropped to thirteen, and then down to around eight something, I believe, and it was our opinion that there was no particular benefit to anyone in holding the picture further.

Q. What then did you do about it?

A. We discussed the moving of the picture with United Artists, and they said they would like to keep the picture on to see if it would gain any momentum. We felt that in light of what the drop-off in business had been it would not increase, that it would go down further, and badly.

Labor Day weekend was coming up after the fourth week. We said we would hold it through the fourth weekend, and the fifth week would have been Labor Day weekend. We felt on that weekend we should have a new picture and that this picture would only do far worse than most pictures had

(5780)

done.

Q. You said, "This picture" you mean SUMMERTIME?

A. SUMMERTIME. SUMMERTIME would drop down to where you would be playing to empty houses, the picture would not sustain itself.

Q. Reference has been made in the questioning by Mr. Sawyer of you, Mr. Beattie, to the concept of house allowance, and you said that you make a distinction between house allowance and house expense. What is the distinction that you make in that regard?

A. Well, house expense contract or house expense deal is when you give your actual house expense, and if it is a 90/10 deal over your actual house expense you give 90 per cent over that actual figure. If you start out with a figure of, we will say for a figure, $6,000, and you have a deal for 90/10 over 6 on actual house expense, if your house expense is actually $5,000 or $4,500, then you have to pay 90 per cent of the difference of the $1,000 or $1,500 to the distributor, if that is your actual expense. It means just what it says, "Over house expense."

Q. What has been your practice with regard to that concept?

A. I have used house allowance, I will not use house expense at any time.

I make a film deal on what I believe is top

(5781)

terms to give off the most I believe in a competitive mar-

ket to the distributor film rentalwise. It has nothing to do —it is not the house expense of the theatre.

Q. Are you familiar with the contractual provisions appearing in the actual documents regarding the problem of house allowance or house expense?

A. Yes.

Q. What do you do in connection with such contractual forms?

A. I usually cross them through and mark house allowance where it says "house expense."

Q. Thereby do you represent o· do you not represent to the distributor what your actual house expense is?

A. I do not represent to the distributor what my actual house expense is.

Q. Well, there has been testimony, Mr. Beattie, concerning the fact that William Goldman Theatres, Incorporated, licensed four Universal pictures: MAN WITHOUT A STAR, CAPTAIN LIGHTFOOT, SMOKE SIGNAL, and SIGN OF THE PAGAN. Are you familiar with that situation?

A. Yes.

Q. Now, it has been testified that the application form of all four of those pictures was dated November 8, and the contract was approved on November 19. When in relationship to those dates did you actually negotiate for those pictures?

(5782)

A. To the best of my recollection I negotiated for these pictures, I believe it was, at the time I was playing another Universal picture at the Goldman Theatre.

I believe they had come to me and asked me to hold the picture that was playing at the Goldman. It was in a discussion, I believe. It was in the early part of the run on that picture.

Q. Do you recall the name of that other Universal picture that was playing then?

A. No. I would have to see my records to—

Q. Was it BENGAL BRIGADE?

A. Was that in that time? Yes, I think it was BENGAL BRIGADE. Was that it?

Q. Do you recall, if I inform you, that BENGAL BRIGADE played from October 19 to October 26, 1954?

A. Yes, sir, because this was one of the pictures they were talking to me on with respect to an alternate picture for the second week, and which they had come to see me on at the same time.

I believe I had had the first day's gross in and was playing the second day, when they were talking to me about trying to hold the picture.

Q. Have you at any time, Mr. Beattie, ever asked any distributor or any other exhibitor to prevent the Viking

(5783)

Theatre from bidding on negotiating for any picture, whether it was on a split or otherwise?

A. No.

Q. Have you ever asked any distributor or any exhibitor to withhold from the Viking the same consideration that you would seek for yourself?

A. No.

Q. Have you ever secured from any distributor or any other exhibitor any promise that such equal consideration would be withheld from the Viking Theatre?

A. No.

Q. Have you ever in any way attempted to influence any distributor with respect to adjustments that might be sought by or granted to the Viking Theatre?

A. No, I have not.

Q. Or with regard to any advertising provision or any other contractual term having to do with the Viking Theatre?

A. No.

* * *

(5784)

RE-DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Beattie, did you consider it an advantage to your theatres to be on the split?

A. There was a time when this could have been an advantage, when it started out, and this was before the Viking Theatre was in the picture.

As it went along I questioned and we many times discussed such advantage or disadvantage.

By doing it, of course, we gave up our privilege to obtain half the product, and by doing it, also, we had one less bidder or one less theatre that would bid against us.

It has been discussed pro and con many times in our organization as to the benefits or the detriments that it brings, and it is—

Q. It has been discussed. Now, as a result of all those discussions the split has continued, has it not?

A. The split has continued and we have had discussions on it continually.

• • •

(5785)

Q. Now, with reference to this house expense or house allowance, actually the distributor asks you to furnish him with house expense, doesn't he, on his forms?

A. They have.

Q. Well, they all do, don't they?

A. I don't think it has been on all forms, but—

Q. Isn't it on most all of them where the item is mentioned, Mr. Beattie, they asked for that information?

A. They could have. I don't remember it came on all of them.

Q. Didn't you say that you crossed it out and put in something else?

A. I never filled out a form. All I have done is crossed out "house allowance"—put in "house allowance" where it said "house expense."

Q. So that there is an item of information that the distributors had asked you for and you don't furnish it, is that correct?

A. I have so told them.

Q. All right, and you get the pictures anyway, don't you?

(5786)

A. I have said I have offered deals that I thought would draw out the highest film rental for the house we were bidding or negotiating for.

Q. Without giving this item of information that the distributor asked for, is that correct?

A. I have never dealt in house expense.

Q. And that is an item of information that he asks for, isn't it?

A. The distributor may ask for it, they ask for many things I don't agree with, the terms on pictures sometimes.

Q. And you get pictures then, don't you?

A. Certainly, it is under negotiation.

Q. All right. Now, in the case of this motion picture SUMMERTIME, actually they protested, did they not, United Artists, that you took that picture off?

A. Yes.

Q. And that was a breach of contract, wasn't it?

A. Yes, it was.

Q. And did they ever bring a suit against you?

A. Sometime later, after we had finished the picture, I believe I persuaded them that it was—

Q. Did they ever bring suit against you?

A. No, they agreed with me later that the picture should have been taken off from the Randolph Theatre.

(5787)

Q. They did agree with that, did they?

A. Several years later the discussion was still—

Q. How many years later?

A. I don't know what it was. I can't tell you.

Q. After this lawsuit was brought?

A. I don't know, Mr. Sawyer. I cannot expostulate on that.

Q. Well, if it was several years later then I guess it was after that, wasn't it?

A. I would say that it was, but the Randolph Theatre, when the Randolph Theatre gets down to $8,000, normally we take pictures off when they are 9 or 10.

Q. Not normally—

• • •

The Witness: I am stating that the Randolph Theatre normally would take off pictures around $10,000, maybe $9,000. This picture got down to eight.

By Mr. Sawyer:

Q. In spite of its contract, is that what you mean?

A. In spite of the fact that we thought the picture would

(5787a)

do business and didn't.

Q. Did you take them off in spite of the contractual provisions?

A. I did on this one.

(5788)

Q. Well, you say normally they would take the picture off. Would that be—

A. Normally the picture would come off the Randolph Theatre doing somewhere in the neighborhood of $10,000.

Q. Do you mean normally it would whether or not you were bound by contract to play it longer?

A. No, that isn't true, not at all. The distributors agreed to this.

• • •

ALBERT W. SCHWALBERG, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Schwalberg, by whom were you employed and in what capacity from 1953 till 1955?

A. Employed by Paramount Film Distributing Corporation as General Sales Manager. I was also President of that

(5789)

distributing arm.

Q. You were president during the time from July, 1954 until April, 1955?

A. That's right.

Q. Did there come a time when you had a meeting in your capacity as President with Mr. Fabian of Stanley Warner and Mr. Goldman, in the summer of 1953?

A. That is correct.

Q. Who else was present?

A. Well, to the best of my recollection, Mr. Howard Minsky was at the meeting, Mr. Harry Kalmine was at the meeting and Mr. Austin Kehoe.

Q. Who was Mr. Austin Kehoe?

A. Mr. Austin Kehoe, now deceased, was the general counsel of Paramount at that time.

Q. Under that agreement did Paramount agree that the Goldman Theatre—

Mr. Rome: There has been no suggestion of any agreement.

Mr. Ward: Objected to.

Mr. Sawyer: Excuse me, that is right.

By Mr. Sawyer:

Q. Was there an agreement reached at that meeting with respect to licensing first-run Philadelphia?

(5790)

A. Yes, there was.

Q. Under that agreement did Paramount agree that—

Mr. Ward: Just a minute. I object to this, sir. This is a leading question. I object to the leading form of the question.

• • •

(5803)

The Court: I want the record to indicate—I don't think I mentioned it—that for my ruling on the fact that Mr. Schwalberg not being presently an officer of the company cannot be called as an adverse witness for the purpose of cross-examination, and secondly, that he cannot be asked leading questions until a contradiction or prior inconsistent statement is shown, I rely on O'Shea v. the Jewel Tea Co., 233 Fed. 2d, 530.

• • •

(5806)

Mr. Sawyer: • • • If I may state for the record, Your Honor, and so that the jury will understand what we are doing, Mr. Schwalberg was called this morning and it has now been agreed between counsel, subject to my objection, that I

(5807)

will read from the deposition of Mr. Schwalberg, that deposition having been taken on March 6, 1959, in New York, in this case, the testimony there given under oath by Mr. Schwalberg, certain portions, some of which were designated by plaintiff and some of which were designated by the defendant in lieu of having Mr. Schwalberg personally testify.

Mr. Nizer: May I just add to that—what you said is quite correct—I just wanted to make it clear that as a result of legal problems submitted to Your

Honor counsel tried between themselves to agree upon the offering of testimony from the deposition and excusing the witness to save a great deal of time, that we consented to that with Mr. Sawyer and then worked out over the lunch hour the sections that we wanted to have read and the sections they wanted to have read, but he will read them all, so that this will constitute the substitution for the witness in saving all those hours.

The Court: Very good.

Mr. Sawyer:

"Q. Were you familiar with an agreement relating to the licensing of Paramount's product in first-run Philadelphia which provided, among other things, that if competitive bids of certain independent theatres were rejected and a picture was then negotiated for, that

(5808)

picture was not offered for negotiation to the independent theatres which had bid, but was only offered for negotiation to certain other theatres?

"A. Well, if this is an elaboration on the so-called Schwalberg agreement and now you are substituting this lengthy sentence for that, I know of no agreement that embodied the wrong material that you dictated."

Mr. Nizer: "embodied the long material."

Mr. Sawyer: "the long material that."

Mr. Nizer: "that you dictated."

Page 9.

Mr. Sawyer: Now, from page 9:

"Q. He was to be in charge of splitting the product?"

Mr. Nizer: Will you begin—

Mr. Sawyer: What?

Mr. Nizer: —one sentence—

Mr. Sawyer: I thought so, too,—

Mr. Nizer: Yes.

Mr. Sawyer: —but I have it marked here that way.

Mr. Nizer: Yes. I know that. It is an inadvertent error. Just identify it.

Mr. Sawyer: "Q. Who was that division manager?

(5809)

"A. Howard Minsky.

"Q. He was to be in charge of splitting the product?

"A. That is correct.

"Q. A that time was there—

"A. There was a further provision, however,—

"Q. Excuse me.

"A. —that with respect to any picture which any other exhibitor who was then in business or later would come in and request an opportunity to bid on, that picture would be withdrawn from the split and would be offered on a bid basis.

"Q. How were you licensing your pictures first-run Philadelphia before the arrangement?"

Mr. Nizer: Correct.

"A. As I recall it, the pictures were put up for bid 100 per cent.

"Q. Did Mr. Goldman explain to you that he was not going to bid for your product?

"Mr. Adams: When is this?

"Q. At the time of this arrangement.

"A. Yes. Mr. Goldman took this position, he said he would not make any formal bids if an exhibitor

(5810)

came in and requested an opportunity and that picture was put on the block. He let it be known that he wasn't going to bid because this was the thing that he had brought—that he had sought to do away with and he was not going to go back on it. He said, however, if we found that bids received did not measure up to our national policy of what we thought of the picture and we wanted to come back to him and he negotiated a deal and that deal was equal to or better than national policy, he didn't want Paramount to take that bid and go across the street and try to better it.

"Q. Did you agree to that?

"A. Yes."

Mr. Nizer: Page 13.

Mr. Sawyer: "Q. After bids were rejected, would the Paramount sales staff be instructed to try to negotiate for national policy terms with Goldma . before doing anything else on the picture?

"A. No specific instructions would be issued. The bids were rejected and the people in the field I assume would immediately go into action and take whatever steps were necessary to get the picture played.

"Q. In many instances the first step they would take would be to negotiate a deal with Mr. Goldman

(5811)

or his company, isn't that right?

"A. Could be."

Mr. Nizer: 17.

Mr. Sawyer: "Q. Will you describe who else sat in and what the procedure was that you refer to.

"A. Well, Mr. Dunne, who is head of the bidding department, and responsible for the functioning of that unit, and Mr. Gibbons I believe was there.

"Q. What happened at this meeting?

"A. Well, I asked Mr. Dunne on the basis of the bids received and on the basis of his projections to disclose at that moment which in his opinion was the best bid.

"Q. What did he say?

"A. It was the William Goldman Theatre.

"Q. The Midtown?

"A. The Midtown, yes."

Mr. Nizer: 19.

Mr. Sawyer: "Q. What do you recall about the discussion of the pros and cons and mathematics and reasoning?

"A. Well, there were the usual discussions: The type of theatre, the grossing potential, the film

(5812)

rental terms offered, and such other factors as might have a bearing on the potential earnings of a picture in the situation.

"Q. Did you know then what your prior pictures that had played at the Midtown were?

"A. Yes, he had records.

"Q. Did you discuss those?

"A. Yes."

Mr. Nizer: 21.

Mr. Sawyer: "Q. And was there any policy in your company against accepting oral bids?

"A. Yes, definitely.

"Q. Wasn't every picture that Goldman got since the arrangement from your company, up until this one, the result of an oral negotiation between your company and his company?

"A Negotiation, not bid."

Mr. Nizer: 45.

Mr. Sawyer: "Q. In negotiating with Goldman would they be authorized to tell him what their national policy requirements were on the pictures they negotiated for?

"A. I would say there would be no restriction. I don't know that there would be any special restriction.

(5813)

"Q. If they wanted national policy terms in their negotiation with Goldman, wasn't it the logical thing for your sales force to do to tell him what the national policy terms were?

"A. Yes, if that is what they wanted they would have to tell him. I wouldn't make him guess.

"Q. And when they would negotiate a deal, who in the home office in New York would be the one to approve it?

"A. Well, as a rule they would go through the normal processes, through the contract department up through the division office through to O'Shea."

Mr. Nizer: Now, there is something left out on the top, top of page 46. We agreed to that, too.

Mr. Sawyer: Well, you will have to show me. I have it marked—

Mr. Nizer: Yes, "Did it come to your attention."

Mr. Sawyer: Start here?

Mr. Nizer: Yes.

Mr. Sawyer: "Q. Did it come to your attention that that is what they did tell them in your negotiation?

"A. I don't know what they did tell them.

"Q. Now, after bids were rejected in Philadelphia

(5814)

who actually did the negotiating with the Goldman Company?

"A. Well, it could have been the branch manager or the division manager."

Mr. Nizer: 47.

Mr. Sawyer: "Q. When the arrangement was agreed upon regarding the split of product, were any other exhibitors advised of that?

"A. I don't know.

"Q. Did you issue any instructions to have such advice given to any other distributor?

"A. I did not."

I believe that concludes the reading, Your Honor.

Mr. Schwalberg, as far as the plaintiff is concerned, you are dismissed. Thank you.

Mr. Schwalberg: Thank you, sir.

Mr. Ward: May we have just a moment, sir?

Mr. Sawyer: May I call my next witness, sir?

Mr. Ward: May we have just a moment, sir? We are just checking these notes to be sure we have covered everything.

Thank you, Your Honor.

The Court: Next witness.

(5815)

Mr. Sawyer: Mr. Paul Osborne.

Mr. Nizer: Just one moment, please, before he is sworn.

Mr. Rome: May we speak with Your Honor at side bar?

Mr. Nizer: May we just say a word?

The Court: Will you step down, please, Mr. Osborne.

(At side bar:)

Mr. Rome: Our objection, sir, is that Mr. Sawyer has not informed us ahead of time about this witness. He has not been listed as a potential witness. We therefore object to his being called.

The Court: What do you propose—

Mr. Sawyer: This witness—

The Court: —to prove by this witness?

Mr. Sawyer: This witness is an impeaching witness, Your Honor, and was not listed or as witness for the plaintiff.

I propose to prove by this witness—this witness is a document expert and a typewriter expert, whom I will qualify as an expert—he had testified in over 80 cases, and so forth—and he will prove, Your Honor, by expert testimony that the piece of paper

(5816)

marked P-170, which has been known here or refused to be known as the "Schwalberg agreement" was typed on a typewriter in William Goldman's office.

Mr. Nizer: Well, what would that impeach, anyhow? What is there about this that is—calls for impeachment?

Mr. Sawyer: Well, because Mr. Goldman said he never saw it; it wasn't—didn't recognize it, and he said he—before that he, when his counsel had it, that he couldn't identify it in any way, couldn't account for it, and knew nothing about it.

Mr. Nizer: He said that—

Mr. Sawyer: He testified as to some other document that was typed out at his home. Of course, it impeaches him, and it is offered for that purpose, as well as to qualify the document. After the document is so qualified, I will offer it.

Mr. Nizer: Well, this, the attempt, Your Honor, to keep enlarging this trivial incident in the way of dramatization for this purpose of alleged impeachment is not only improper legally but is particularly offensive to the defendants who have at all times sensed and noted an attempt to create a prejudicial inflamed atmosphere about something that is of no consequence.

(5817)

There are 13 Paramount pictures out of 87 that are involved in this case—13 of Paramount. Of those 13 Goldman got 7. Of those 7, 4 were by bidding, concededly. So, naturally, being by bidding, it didn't involve the so-called Schwalberg agreement which only came into play if the bids were rejected and they were offered for negotiation, and the question then was, according to the plaintiff, "Did you have to go exclusively to Goldman?"

So 4 are out of the 7. Of the 3 left, one, the bid was not rejected, so that takes it out of the alleged Schwalberg scope.

This case, therefore, involves 2 pictures. This whole so-called Schwalberg business about which typewriter experts are now being offered for some improper purpose involves two pictures in the entire period of suit, and what are they?

Evidence is already in the record. This is not beyond the record.

Those two pictures are COURT JESTER and DESPERATE HOURS about which Your Honor will recall testimony.

Of those two pictures, bids were rejected and they were subjected thereafter to negotiation, contrary

(5818)

to what the plaintiff contends. They were not negotiated solely with Goldman.

A regular form letter went out to all exhibitors who had made the bid saying, "Your bids have been rejected; therefore, we will negotiate further with each of you."

The plaintiff admitted on the stand—and I will cite the record for Your Honor in a moment—

Please have Mr. Smith get that for me.

Mr. Ward: I will get it.

Mr. Nizer: The plaintiff admitted on the stand that he had gotten such a letter, so that this is not even a matter in contest.

On the two pictures involved, he received a letter inviting him to negotiate—now, the only two pictures in this entire lawsuit to which all this fuss is being made—thus contradicting in the record the words of the plaintiffs that if a picture was rejected we didn't go to the plaintiff or anybody else; we went solely to —no; that would be Wren.

Mr. Ward: Where Wren?

Mr. Nizer: Yes.

Mr. Ward: Where Wren?

Mr. Nizer: Where Wren conceded he got this

(5819)

letter.

The exhibit, incidentally, on this—

Mr. Sawyer: You don't have to get the record.

Mr. Nizer: No. I want to.

Mr. Sawyer: Suppose he did.

Mr. Nizer: No, no, no, please. Let me make my statement in view of what you are attempting to do here by way of information and enlargement of this issue, calling typewriter experts. You would think that this was a criminal case.

Consequently, Your Honor, there is already in the record, and the exhibit numbers are Exhibits D-19 and D-31, in those pictures involved—and only two—that this whole subject matter is involved, there is an admission by Wren that he got a letter inviting him to negotiate.

Indeed, Your Honor will recall, it is on COURT JESTER, after he conceded he got the letter inviting him to negotiate, that he testified at great length that he didn't lift a finger, even though he was in the office, all that testimony about the Alphonse and Gaston: "You were waiting for them." So he had an opportunity to negotiate in both of those pictures.

(5820)

Now, Minsky, Howard Minsky and Ulrik Smith of Paramount are the next two witnesses scheduled to testify. They are both of Paramount.

Your Honor said that at an appropriate time we would intersperse Mr. Wren on this damage schedule. We did not raise the point of not calling Howard Minsky and Ulrik Smith who are seated in this court. We thought that as long as we had now disposed of the Schwalberg deposition—and this matter was before us—let Your Honor and the jury hear the two men, the only two executives who followed the practice either that the plaintiff says, whom he is calling, or that we say was a practice, and the record is documentary and it cannot be denied.

Consequently—to now pretend—withdrawn.

One other statement I want to make on this: Mr. Schwalberg is here and plaintiff chooses not to ask him

about this matter, but to stipulate with respect to his testimony, and not a word is said about this matter.

He had an opportunity, and he would be bound by that witness if he called him, it is true, under the Moran case, but, nevertheless, he had scheduled him, he had subpoenaed him, and he had called him.

Now, by this attempt to create an impression,

(5821)

no matter what this witness says—suppose it were on a typewriter that was in the Goldman office and that typewriter was in his home that day. I don't know and I don't care. What the memorandum said, what the alleged memorandum that he didn't recognize says is not important.

Furthermore, there is no testimony that that memorandum is the memorandum that was typed, no matter where this document was typed, and I have some information about that, and I had wanted to stay away from this zone, because it is of no consequence or I would have some questions to ask him about where the original is of a document which is not the memo that was typed that day according to all witnesses.

But I didn't want to get into that. I thought once and for all we would put all this inflammatory, prejudicial stuff out of this case and try the case on the issues; and I had hoped, when Mr. Sawyer stipulated with respect to the deposition, that we were back on the road to trying the case on the merits.

Minsky was the next witness. He could ask him to his heart's content what was done when the picture was rejected: Did you go to Goldman alone? Did you send letters out? If so, where are the letters?

(5822)

Mr. Ulrik Smith, a very distinguished, fine man, is here, and could tell him the facts. We have the documents.

Instead of that, we have this so-called dramatic step of calling a typewriter expert to give the jury an impression that something is wrong with a document when that document couldn't possibly have any bearing in this matter and when the whole matter has already been disposed of and involves at most, Your Honor, to show you that it isn't a tempest in a teapot, this whole business involves two pictures in which the contrary was done that the plaintiff claims about in the entire two and a half year period, and that is conceded in this record.

Do you want me to read it?

Mr. Ward: 1889 to 2046 we offered those two letters.

Mr. Nizer: Here is what I said I would show Your Honor from the record at page 1899.

Mr. Ward: It had to do with DESPERATE HOURS.

Mr. Nizer: This is DESPERATE HOURS, one of those two pictures.

Question of Mr. Wren:

"Q. And were you invited after those bids were (5823)

rejected to negotiate again with Paramount for DESPERATE HOURS, having a second opportunity, now, not to bid, but just to negotiate with them?

"A. I don't believe so, sir," he starts out.

I quote from the letter:

"Q. 'Therefore, we will negotiate further with each of you. Kind regards, Paramount.'

Does that remind you that they did give you a chance to negotiate a second time?

"A. Did they negotiate with me, sir?

"Q. No.

"A. Just because it says, 'Therefore, we will negotiate further with each of you'—

"Q. My question was, Mr. Wren, did they invite you to negotiate after the bids were rejected."

And there is again a colloquy and a denial, whereupon I offer the letter in evidence, and after showing him the letter—and I read it—and here is the letter—it is read to the jury—September 27, 1955, at page 1900:

"This is to advise you that we have received on the motion picture the DESPERATE HOURS, as offered in our letter of September 14, 1955, offers from the

(5824)

following: Stanley Theatre, Philadelphia; Mastbaum Theatre, Philadelphia; Trans-Lux Theatre, Philadelphia; Viking Theatre, Philadelphia. We do not regard said offers as satisfactory. Therefore, we will negotiate further with each of you.

Kind Regards,

Very truly yours,

Ulrik Smith."

And then when I questioned—(Mr. Rome indicates to Mr. Nizer.)

Mr. Nizer: Yes.

"Q. Now, before you said you didn't know that there had been bids by other theatres. It is clear now that in this rejection which was sent equally to all, apparently—

"A. Right, sir.

"Q. —that you knew that the Stanley Warner," and so on, and so on?

"A. Yes. When I received that letter, yes, sir."

He gets a letter inviting him to negotiate.

And also then a little later at page 1901:

"Q. And after the bids were rejected, the letter ended: 'Therefore, we will negotiate further with each of you. Kind Regards.' So you were told that now you could negotiate for this picture, right?

(5825)

"Mr. Sawyer: No: Excuse me.

"The Witness: It doesn't say that there, sir. I just read what it says.

"Mr. Nizer: All right, Mr. Sawyer. I will cross-examine him," and so on.

Then here is the—I won't read too much. 1902.

"Q. When you received this letter from Paramount, 'Therefore, we will negotiate further with each of you,' and that is addressed also to you, did that mean to you that now that the bids were rejected no more bids were necessary but they would negotiate with each of you to see if they could come to terms?

"A. And I told you I don't recall that they tried to negotiate with me.

"Q. You recall that you tried to negotiate with them?

"A. It says, 'we,' sir. It doesn't tell me to come over."

And then we went into all of this business of who has to come to whom.

Mr. Ward: Now, may I supplement, sir, just a few thoughts that I think completely will demonstrate the impropriety of calling this witness not only at this

(5826)

time but at all.

May I read first just a few lines from the pretrial order, the sixth pretrial order dated September 2, 1960:

"One week before plaintiff puts on its case it will furnish opposing counsel with lists of names, addresses and occupation of each witness it intends to call. This will include any experts who will be designated as such. Copies of exhibits will also be furnished at the same time. One week before conclusion of plaintiff's case, defendants will furnish plaintiff with the same information, except that this procedure does not apply to documents to be used solely for impeachment."

Now, therefore, the calling of this witness at this stage is not in conformity with this pretrial order. That is only one point that I should like to make.

The second point is this, sir—and it goes to the fundamentals of this question—this is not in any sense impeachment, as such.

I call Your Honor's attention to the fundamental proposition, first, that Mr. Goldman was called here as an adverse witness, being president of one of the companies and, as such, subject to cross-examination.

It is fundamental in cross-examination—

(5827)

and the books are full of this principle—that you cannot set something up in cross-examination and then knock it down.

Your Honor will recall Mr. Goldman during the course of his examination did not rely on this document which is now sought to be used as the basis of an impeachment. He didn't offer it, he didn't testify with respect to it, and the crucial point is that it was shown to him for one purpose and one purpose only; namely, in an attempt to refresh his recollection.

He stated that it did not refresh his recollection, and it is clear under the rules of evidence that a docu-

ment used for the purpose of refreshing a witness' recollection is not otherwise usable if the witness disclaims knowledge of it and disclaims the fact, that it doesn't refresh his recollection.

In other words, before there can be any reference to the document, it must be made to appear that it does refresh the witness' testimony, and even then, even if it does, even if the witness say, "Yes, this refreshes my recollection," that doesn't make the document admissible into evidence.

Mr. Nizer: That is right.

Mr. Ward: Now, then, in view of that fact and

(5828)

in view of the fact that it is not even in evidence, how is it possibly permissible under any theory of impeachment,—

Mr. Nizer: That is right.

Mr. Ward: —to call a handwriting expert to testify with respect to a paper that hasn't even been introduced and which is inadmissible?

That seems to me goes to the vitals of it and makes it very improper to call this witness because for the purposes of impeachment or otherwise.

The Court: Let me ask you, Mr. Sawyer: This witness is going to say that he looked at this photostat and then he compared it with what?

Mr. Sawyer: He compared it with bids which we had—of which we had also photostats which were in this case, as being foundation, or other letters or communications from the Goldman office, which were authenticated by the defendants as such, two or three of them, and that the typewriters that typed the two documents were the same typewriter.

Now, all that Mr. Nizer said, Your Honor, I think is—

The Court: Now, your theory of the admissibility is that it impeaches Mr. Goldman's testimony in that when

(5829)

Mr. Schwalberg was visiting his home, when they came back from that drive Mr. Schwalberg had a typed memorandum, which he showed Mr. Goldman, but which Mr. Goldman said was not the photostat.

Mr. Sawyer: Yes, sir.

The Court: Now, in other words, your idea of impeachment is that Mr. Goldman must have been lying if he said it was just typed in his home, when your expert is going to say that that typewriter was down the office?

Mr. Sawyer: Well, it is more than that, Your Honor.

Mr. Nizer: Well, how do you know it was in the office?

Mr. Sawyer: It is not only—when you say "it," you [illegible] th[illegible] would be a discrepancy, but it might not be s[illegible] a tremendous one, if you assume that there is one document when you say "it" was typed at his home, but the document that was typed at his home has never made its appearance. The document marked P-170 has been specifically denied by Mr. Goldman emphatically and repeatedly to have been any document that was ever—that he saw or knew anything about or anything else.

It goes much further than merely the fact that

(5830)

one would presume that a document typed at his home

was not typed in his office. It is the question of the authenticity of P-70, P-170, because the document didn't—

Mr. Steinberg: 190.

Mr. Sawyer: 190. I have said "170." I have been meaning "190" right straight through.

—because the document that Mr. Goldman finally told us about after he was taken on direct, or whatever you want to call it, is not in existence, or, I mean, it is missing. We never saw it.

And the document that I am trying to—I asked him about repeatedly is one that he has asserted most emphatically and unequivocally he has never seen, knows nothing about. So that it really goes much further than just a discrepancy.

Secondly, if it is shown it originated in this fashion, then I would move its admission.

Mr. Nizer: It is not in the case yet.

Mr. Sawyer: Of course, it is not in the case yet. That is just the point. This is one of the ways in which it would be eligible to be admitted into evidence.

The Court: How is it competent as evidence?

Mr. Sawyer: Well, if it is a document, Your

(5831)

Honor, that was—in the first place, it is relevant, of course. It has to do with—it purports to state what the Schwalberg agreement was.

Mr. Nizer: No. It isn't his testimony. It isn't—

Mr. Sawyer: Just a moment.

Mr. Nizer: No. The document is denied.

Mr. Sawyer: He denied that that was the effect of his testimony.

Mr. Nizer: That is right. He gave you his testimony.

Mr. Sawyer: And so that would tend to impeach. That is another point of impeachment. It would tend to impeach him as to what the Schwalberg agreement actually was.

In fact, he has already been impeached by Mr. Schwalberg, because part of the—what I read here was denied by Mr. Goldman as being a feature; i.e., that they wouldn't go back across the street.

Now, Schwalberg has already to that extent impeached what Goldman's version was.

Mr. Nizer: We don't think so, sir.

Mr. Sawyer: Well, it is just as clear as black and white.

(5832)

Mr. Nizer: No. It isn't at all, when you read—

Mr. Sawyer: Well, all right.

The Court: Wait a minute.

Mr. Sawyer, this is what I can't understand: How is the typed document typed by Mr. Schwalberg, if that is going to be established? That hasn't been established yet.

Mr. Sawyer: No. I am not saying this document was typed by Mr. Schwalberg. Of course, the whole story, I think, is—

The Court: Well, you say it was made by Mr. Schwalberg.

Mr. Sawyer: No. I don't at all. Well, "made by." I think it was probably dictated—it was typed in his offices—Mr. Schwalberg's and Mr. Goldman's meeting, that they typed this out as what the agreement was.

The Court: Well, how are you going to prove that?

Mr. Sawyer: Well, I mean—

The Court: I mean, merely by just showing this document and saying, "I am offering it in evidence"? How is it evidence at all? We don't know when it was

(5833)

typed. We don't know who typed it. You claim that it was dictated by somebody in Mr. Goldman's office, either Mr. Goldman or somebody else. That doesn't authenticate it in any way.

Mr. Sawyer: If Your Honor would rule that it is still not admissible in evidence, that would be one thing, but that wouldn't—but that ruling, that even showing that it was typed on a typewriter in Mr. Goldman's office, if Your Honor then ruled that that was not sufficient to admit the document—and I would urge you that it is enough—it would be admissible.

The Court: Well, let me entertain your thought. In other words, you say that this document is self-authenticating and competent in evidence just the way it is now?

Mr. Sawyer: No, not now.

The Court: All right. What else are you going to prove?

Mr. Sawyer: Well, after I prove that it was typed in Mr. Goldman's office, after I prove that—

The Court: Well, what does that establish?

Mr. Sawyer: Well, it is a document that originated with the defendants, it was typed in his office, and that it has to do with the understanding

(5834)

that was reached and the terms of it.

The Court: Yes, but you don't have any evidence as to who typed it, as to whether Mr. Goldman did. He says he never saw it before.

Mr. Sawyer: Then it impeaches him.

The Court: How does it impeach him?

Mr. Sawyer: Well, because, how can it be possible for him to—

The Court: First of all, the typewriter could have been at his home. Secondly, assuming it was typed in Mr. Goldman's office, we don't know who typed it. So you are going to say that that is evidence in the case?

Mr. Sawyer: Well, we don't—you mean we don't know the particular individual, the secretary, or whoever it was?

The Court: Either Mr. Goldman or—

Mr. Nizer: That is immaterial.

Mr. Sawyer: It is a document from the—

The Court: You just can't find a document like this and say that it is strange, it only developed in the trial of another case, and then come into this trial and without more than you have just indicated say that the mere fact that Mr. Goldman says he never

(5835)

saw it before, the mere fact that Mr. Goldman said Mr. Schwalberg did type a memorandum, but that is not it, and where it is nobody knows, then you are going to have this expert who is going to say that the typing of this so-called Schwalberg memorandum is similar to the typing appearing on the bids which were

submitted by Goldman organization, and therefore that would make the document competent.

Mr. Sawyer: Well, two points, Your Honor: Whether it is competent as evidence or not, it certainly tends to impeach Goldman.

Mr. Ward: Could not.

Mr. Sawyer: If a man says—

Mr. Nizer: It couldn't, possibly.

Mr. Sawyer: He looks at the document.

Mr. Ward: It isn't even in the evidence.

Mr. Sawyer: He says repeatedly that, "I have never seen it. This isn't any document that is the memorandum that was written by Mr. Schwalberg."

Mr. Ward: Could I point out—

The Court: Well, how can you impeach a witness like that? I mean, we don't even know who did it, who made it.

(5836)

Mr. Nizer: You are now saying—

Mr. Sawyer: We don't have to show he does—

Mr. Nizer: —Goldman did it.

The Court: You are saying, "Well, now, Mr. Goldman, this is something different from what you have testified. Look at it."

"I never saw it before. I don't know anything about it."

Mr. Sawyer: And you don't think it impeaches him after making that statement—

The Court: No.

Mr. Sawyer: —to show that it was typed in his office?

The Court: No.

Mr. Nizer: Certainly.

The Court: You have to identify it. Suppose you prepared it in your office. Suppose an investigator in your behalf prepared it. Anybody could have prepared it.

Mr. Sawyer: In his office?

The Court: Well, certainly, of course.

Mr. Sawyer: Your Honor, I don't see how that could be. We don't have access to his office.

Mr. Nizer: Nor do you say his office; you say

(5837)

his typewriter,—

Mr. Sawyer: All right.

Mr. Nizer: —and Goldman himself testified—and you didn't ask any other witness—but Goldman testified that he was told by Schwalberg that he had typed it in his home on a typewriter, and you don't say that isn't the same one, but that this document—

Mr. Sawyer: But you—

Mr. Nizer. Wait a moment.

—that this document—he admitted there was a paper typed—but he said this document that you showed him isn't that,—

Mr. Sawyer: It is not. All right.

Mr. Nizer: —and, indeed, it is not, and if you want to have a contest about that document, not in the presence of the jury, in judge's chambers, I would

welcome it, sir, because I have a good many questions to ask about that.

Mr. Sawyer: Well, you can ask all the questions you like. Nobody is stopping you, for heaven's sake.

Mr. Nizer: No. We don't want to get a mistrial in this case by putting in an inflammatory issue of a false, forged document against you or against us.

Mr. Sawyer: Oh, forged document. I am pre-

(5838)

pared to prove that—

Mr. Nizer: Well, that is what you are charging against us.

Mr. Sawyer: I am putting—here I am prepared to put a typewriter expert in that will testify that it is a typed document that was typed on a typewriter in his office, and they start talking about a forged document, and that is one of the things we hear, if I don't put this in.

Certainly, Your Honor—

Mr. Nizer: I don't care if you don't put it in.

The Court: Mr. Sawyer, I have considered this point. I said that unless you can convince me to the contrary, that even if Mr. Schwalberg testified, you could show it to him to refresh his recollection, but never to be competent as evidence itself.

Mr. Sawyer: All right. Suppose it isn't evidence itself. I mean, assuming it isn't. That still wouldn't keep it out as an impeachment of Goldman as a witness.

Mr. Nizer: What theory is that? Suppose it was a newspaper ad.

Mr. Sawyer: I am showing a document to the witness and he continues to say he has never seen it

(5839)

before. Is it not relevant and does it not tend to impeach him that the document of which he professes total ignorance unequivocally was typed in his office—

Mr. Rome: No. This doesn't impeach him at all.

The Court: I am prepared to rule.

Mr. Sawyer: —in showing it was typed in his office?

The Court: I am prepared to rule.

I hold that the document is incompetent.

I hold further that the offer of proof as to this typewriter expert is incompetent and inadmissible for the reason that I think it is too remote from the issue; it doesn't tend to establish the fact that the typewriter was always in Mr. Goldman's office; and since the document itself I have ruled is inadmissible, for a further reason that this proposed expert evidence is also incompetent.

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(5843)

HOWARD G. MINSKY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Minsky, by whom are you employed?

A. I am employed Paramount Film Distributing Corporation.

Q. And were you so employed in period of 1954, from July, 1954, to November, 1956?

A. I was, sir.

Mr. Sawyer: This witness, Your Honor, is called on cross-examination under Rule 43(b).

The Court. Very well.

By Mr. Sawyer:

Q. Have you been in the Aldine, Mr. Minsky, since it was remodeled—excuse me, the Viking.

A. Yes, sir.

Q. And do you recall when it was the Aldine?

A. Many years ago. I do not recall the exact date.

Q. Do you recall that the Aldine threw off some terrific grosses?

A. I do.

(5844)

Q. Were you informed in the summer of 1953 of an agreement under which, with respect to Paramount, Goldman and Stanley Warner were not to bid against each other?

A. Yes.

Q. Was this the agreement known as the split?

A. I do not understand what you mean, Mr. Sawyer.

Q. You were informed in the summer of 1953 that there was an agreement whereby the William Goldman Theatres and the Stanley Warner Theatres were not going to bid against each other for the product of your company.

A. Yes, sir.

Q. Was there a name for that agreement?

A. Not to my knowledge, sir.

Q. Wasn't it called the split?

A. I thought you meant some title given to it. It was a split.

Q. It was called the split, wasn't it?

A. We did this—yes, sir, split.

Q. Who actually split the pictures from then on?

A. I split the pictures for Paramount.

Q. Did you then advise Goldman and Stanley Warner or either or both of them what split had been made?

A. They were so advised.

Q. By you?

(5845)

A. Generally by Ulrik Smith.

Q. Now, on the Paramount picture STRATEGIC AIR COMMAND, do you recall that picture?

A. I do, sir.

Q. Was there competitive bidding on STRATEGIC AIR COMMAND?

A. If I may see the documents it would help me to answer your question, Mr. Sawyer.

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(5856)

(The following occurred at side bar:)

Mr. Sawyer: I offer to prove through this witness that Paramount selected the Stanley Theatre in the case of STRATEGIC AIR COMMAND without any bidding among other distributors.

Also, since I am up here, I offer to prove the same thing in the case of the picture WHITE CHRISTMAS, that it was selected without any bidding among other exhibitors.

Now, the WHITE CHRISTMAS, this is an offer of proof, but I realize that it is clearly covered by Your Honor's 87. Since I have it right here I will make it now. Other offers of this kind I will make at the end of the case.

Mr. Ward: I object to the offers, Your Honor.

(5857)

Mr. Sawyer: How can you object to the offer? I understand your objection has been sustained to

that. It takes up time to argue it now. I do not mean to be rude, Mr. Ward, but when I make an offer of proof it is because the judge has sustained you in one of your objections. Why then go through and make another one? It just takes a lot of time.

Mr. Ward: You see, Mr. Sawyer, when you make an offer I must indicate my response to it, on the record.

Mr. Sawyer: All right. I did not want to waste too much time.

Mr. Ward: I only said I object to it, I am not going to make a speech.

Mr. Sawyer: All right.
That is the offer, Your Honor, just that.

The Court: Well, that is the same point that we had before.

Mr. Sawyer: Yes, sir.

The Court: The same question with different pictures. I expanded, if you want to call it, the 87, with respect to STRATEGIC AIR COMMAND, but only because of this testimony about the screening.

Mr. Sawyer: Yes, sir, I understand. So I

(5857a)

was making an offer with respect to another point on STRATEGIC AIR COMMAND, and I understand that is ruled out.

The Court: Yes.

Mr. Sawyer. That is right.

(End of side bar conference.)

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(5858)

Q. Did you attend the screening of STRATEGIC AIR COMMAND in Washington?

A. I did, Mr. Sawyer.

Q. Who is George Crouch?

Who is George Crouch, sir?

A. I am trying to recollect. I believe there were two Crouches in Washington. There was one employed by Loew's Incorporated, operators of the theaters in Washington, and there was a Crouch employed by the Stanley Warner Theatres Corporation.

Q. I am referring to the one who is employed by Stanley Warner. He was zone manager of the Washington office, was he not?

A. Yes, he was, Mr. Sawyer.

Q. Who is Frank LaFalce?

A. Frank La Falce was an advertising man employed by Stanley Warner Theatres in Washington.

Q. They were at this screening, were they not?

A. I cannot say whether they were or they were not. I do not recall to the best of my memory at the moment any exhibitors that were present at that screening.

Q. Wasn't there a time when you agreed that George Crouch and Frank LaFalce of Stanley Warner were probably present at

(5859)

the screening of STRATEGIC AIR COMMAND in Washington?

A. I do not know that I agreed—if I so stated that they were there—

Q. I am asking you whether you didn't state that—

A. I do not recall stating that they were there.

Q. Do you recall being asked whether or not there were any other Stanley Warner executives there?

A. You ask whether I recall?

Q. Yes, whether you—

A. I do not recall, Mr. Sawyer.

Q. Would you be sure that there weren't any?

A. To the best of my—

Mr. Wolf: I object to that. That is no form of question.

Mr. Sawyer: It is cross-examination.

The Court: Overruled.

The Witness: Would you repeat the question?

(The question was read by the reporter.)

A. I do not recall any exhibitors being present at that screening in Washington.

By Mr. Sawyer:

Q. But there may have been?

A. I do not recall any.

Q. Would you agree that there may have been?

(5860)

Mr. Wolf: I object.

A. No.

* * *

Q. Now I will read you your deposition, Mr. Minsky.

Mr. Wolf: I object to that.

Mr. Sawyer: Page 97.

The Court: Well, now he says that he doesn't recall, there may have been. He is asked the question could there have been exhibitors there. He says "I don't recall." Now as I understand it Mr. Sawyer is going to try to refresh his recollection by reading and will ask, "Did you testify this way before?" He can do that.

Mr. Wolf: If that is what it would show.

Mr. Ward: What is the page, Mr. Sawyer?

Mr. Sawyer: Page 97.

By Mr. Sawyer:

Q. Q. Were any exhibitors there from Stanley Warner?

And you understand that the questioner is asking you with respect to this showing of STRATEGIC AIR COMMAND.

A. Yes, sir.

Q. Q. Were there any exhibitors there from Stanley Warner?

A. I don't recall specifically. There may have been. If so they were only from the Washington office.

Q. Were there any of the national executives of Stanley Warner there?

A. Not to my knowledge.

Q. What Stanley Warner employees from the Washington office do you think may have been there?

A. Possibly George Crouch, who was the zone manager of the Washington office, Frank LaFalce and maybe one or two others, but if so I don't recall and I am not sure about those two.

Mr. Ward: Now, sir, I respectfully object to the reading—

Mr. Sawyer: I haven't asked a question.

Mr. Ward: Just a second.

I object to the reading of the deposition be-

cause it quite patently is not a contradiction at all. There is nothing inconsistent with what Mr. Sawyer has just read and what Mr. Minsky said on the stand. Unless there is, sir, I say it is improper to read depositions.

Mr. Sawyer: Whether it is inconsistent or not is a question for this jury, and that is not an objection. I haven't put a question to the witness yet as a result of reading that.

Mr. Ward: It is not, sir, I respectfully submit, a question for this jury. It is a question for Your Honor primarily and it is improper I submit to refer to depositions unless there is really some sound foundation for the assertion that there is a conflict between what the witness says on the stand and what he said on a previous occasion. That is the basis of the objection.

The Court: I agree with Mr. Ward. In other words, if this witness in deposition said the same thing that he is now saying there is no purpose in reading the deposition. It is only where he contradicts himself.

Mr. Sawyer: Your Honor, my contention is that he goes further in his deposition than he went here; that when asked whether any employees of the Washington office were there he says, "Well, possibly George Crouch, who is zone manager, and Frank LaFalce." Now, today he—

(5863)

Mr. Rome: He goes on to say that he is not sure that they were there.

Mr. Sawyer: That is right, he isn't sure.

Mr. Nizer: He doesn't recall, which is what he testified to.

Mr. Sawyer: He is saying, Your Honor, that his recollection now is that they weren't there, which is different. When asked the question before who they were he comes forward with the answer that possibly George Crouch was there and Frank LaFalce.

The Court: I don't see that there is any contradiction. He says he doesn't recall.

The Witness: Your Honor, may I explain the screening, how this came about, the reason for it?

Mr. Sawyer: There is no question pending.
Is Your Honor sustaining the objection then?

The Court: Yes.

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(5869)

By Mr. Sawyer:

Q. Now, Mr. Minsky, with respect to the motion picture COUNTRY GIRL, was it you that visited Mr. Goldman after the bid of the Viking and others had been rejected?

A. Yes, Mr. Sawyer, I visisted Mr. Goldman.

Q. You knew at that time what the Viking had bid, didn't you? You knew what the Viking's bid was at that time?

A. The Viking had made an offer on the picture as part of—

Q. A written bid, hadn't it?

(5870)

Excuse me. It had made a written bid, had it not?

A. I would like to finish my reply, Mr. Sawyer.

Yes, the Viking had made an offer on the picture, which was one of many that were rejected.

Q. Very well. And you knew at the time you went to see Mr. Goldman what the Viking bid was, didn't you?

A. I had that knowledge.

Q. Yes. And had Mr. Goldman previously bid orally over the telephone?

A. Yes, Mr. Sawyer.

Q. Was that bid late, the oral bid over the telephone, was it late?

A. I believe it was, Mr. Sawyer, although I would like to refer to the record

Q. Well, you testified before, I believe, that you agreed that that bid was late.

A. If you say so.

Q. On page 15 of your deposition. And in spite of that fact was that oral bid considered along with the others?

A. It was not, sir.

Q. It was not.

Did anyone instruct you to go to see Mr. Goldman at this point with respect to COUNTRY GIRL?

(5871)

A. I had been asked to make it certain to Mr. Goldman and make it clear, crystal clear, that Paramount would under no consideration consider a bid on COUNTRY GIRL unless it was in writing. And I visited Mr. Goldman at his office together with Mr. Urik Smith to make it absolutely clear to Mr. Goldman that when he is talking about $75,000 on a motion picture for first-run Philadelphia, that he had best put it in writing; that we would under no consideration accept an oral bid from him and that if he was serious about negotiating or putting a bid in on the picture that he had better put in writing whatever his bid may be.

Q. Why did you do that only on this picture COUNTRY GIRL? Why?

A. I had talked with Mr. Schwalberg who was the general sales manager of my company at that time.

Q. By the way, you didn't answer my previous question, if I may interrupt. Was it Mr. Schwalberg who so instructed you with respect to COUNTRY GIRL?

A. I am sorry, Mr. Sawyer, if I didn't answer your question.

Q. That is what I originally asked you.

A. I am sorry.

Q. Who instructed you? Was it Mr. Schwalberg who instructed you to go and tell Mr. Goldman this?

A. No, Mr. Schwalberg instructed me in the course of our

(5872)

daily business conversation to make it clear to Mr. Goldman that if he was going to bid on COUNTRY GIRL that he had best put it in writing.

Q. That is what I say. It was he who gave you these instructions that you told us about?

A. He told me to make it clear. He did not give me instructions to go over to see Goldman. I went over to see Goldman with Ulrik Smith.

Q. You did that you your own, did you?

A. Yes, I did, Mr. Sawyer.

Q. What was it that Mr. Schwalberg instructed you with respect to going over to see Goldman?

Mr. Rome: The witness has just said that he was not so instructed.

Mr. Sawyer: Well, he was instructed something by Mr. Schwalberg.

By Mr. Sawyer:

Q. But you say you weren't instructed to go to see Mr. Goldman?

A. I spoke with Mr. Schwalberg on the telephone, which is our normal business operation, because I conducted business for not only Philadelphia but for many other branches in the United States, and so it was not unusual for me to speak with Mr. Schwalberg during the day on many matters.

(5873)

Q. Precisely. He was your boss, wasn't he, in New York? He was the boss of the company, wasn't he?

A. I am trying to answer your question and make that point, Mr. Sawyer.

Q. Well, am I clear—you don't have to take up any time in justifying your talking to Mr. Schwalberg. We quite understand that. What I am trying to get at is what it was that Mr. Schwalberg instructed you. I understood that you said he did not instruct you to go to see Mr. Goldman but he did instruct you that you would have to get a bid in writing. Is that correct?

A. No, I didn't say that, Mr. Sawyer, not to my knowledge. I said I spoke with Mr. Schwalberg, who instructed me to make it crystal clear to Mr. Goldman that if he wanted to bid on COUNTRY GIRL it had best be in writing, and I went over to see Mr. Goldman, together with Mr. Ulrik Smith.

Q. All right. Can we stop just right there?

A. Surely.

Q. Is it your point that Mr. Schwalberg said to you that you had better make it clear to Goldman that if he wants to bid on COUNTRY GIRL it will have to be in writing but he didn't say "and then go see him," is that your point?

A. I don't recall that he did say to go see Goldman.

Q. All right. You testified, I believe, that you went on

(5874)

your own motion to see Goldman but that Mr. Schwalberg told you that Mr. Goldman would have to put a bid in writing.

A. Yes, sir.

Q. Didn't he eepxct you to tell Mr. Goldman that?

A. Oh, yes, sir.

* * *

Q. Now, why was it that—isn't it true, Mr. Minsky, that on other pictures no requirement was made by Paramount to Goldman that the bid be in writing prior to February of '56?

A. Mr. Sawyer, $75,000 is a lot of money.

Mr. Sawyer: Your Honor,—

A. It is my job to try—

Mr. Sawyer: Just a minute, Mr. Minsky.

The Court: Yes. You may answer the question yes or no or "I don't remember" and then give your explanation.

A. I am sorry, Your Honor.

(5875)

Will you ask the question, Mr. Sawyer?

The Court: Read the question again, please.

(The question was read by the reporter as follows:)

"Q. Now, why was it that—isn't it true, Mr. Minsky, that on other pictures no requirement was made by Paramount to Goldman that the bid be in writing prior to February of '56?"

A. No, I had not gone to anyone else on a matter of this type. It hadn't come up before.

By Mr. Sawyer:

Q. It is not whether you had gone to anyone else, Mr. Minsky. The question is, as has been stated by the stenographer, not whether you went to anybody else at all. The question is isn't it true that prior to the change in arrangements that were made in early '56 you never had a written bid from Mr. Goldman on any other picture? That is true, isn't it?

A. We had a written bid from Mr. Goldman but not during the period subsequent to the split.

Q. All right, I am speaking of during the period of this suit.

A. We had not had a bid.

Q. Now, why was it that if you accepted Mr. Goldman's—

(5876)

and he got some of your ictures, didn't he, by negotiation during this period?

A. It could be.

Q. Well, you have no doubt about it, do you?

A. It could be. I would want to look at the record.

Q. Well, he played a number of your pictures prior to COUNTRY GIRL?

A. If you say so, Mr. Sawyer.

Q. And they were not on a written bid, were they?

A. If he played any pictures during that period they were not on a written bid.

Q. All right. So that on COUNTRY GIRL then, the requirement that Mr. Goldman would have to put his bid in writing on COUNTRY GIRL was unique at this time, was it not?

A. It was not unique.

Q. Well, name me, if it is not—"unique" means in my sense one of a kind.

A. I understand what you mean, Mr. Sawyer.

Q. All right. Now can you name me than any other motion picture on which Mr. Goldman put in a written bid during this period?

A. Your question was whether or not it was unique for him to put anything in writing.

Q. All right, that is my question.

(5877)

A. And it was not unique for Mr. Goldman to put this request, this bid, in writing on a picture that he wanted to put the kind of money up for that he was going after.

Q. All right.

A. And that is why we insisted that if he was really serious about going after this picture he put it in writing.

Q. Now, if it was not unique, I will ask you, Mr.

Minsky, to please tell me any other motion picture on which he did it during this period.

A. He had not put it in writing on any other picture to my knowledge.

• • •

(5878)

Q. Had there been any other occasion, Mr. Minsky, with respect to Paramount films, where during this period Mr. Goldman put up a guarantee?

A. I don't believe so, Mr. Sawyer, during this period.

Q. At the time that he gave you this offer in his office the Trans-Lux offer was pending, wasn't it?

A. I don't know what you mean by "pending."

Q. Well, I accept that. I am not sure that it is clear.

Had you at that time had an offer from the Trans-Lux Theatre?

A. We had had an offer from the Trans-Lux on the first go-around, which was part of those that were all rejected.

Q. Very well. And that offer contained, among other things, a $75,000 guarantee, did it not?

A. It did.

Q. When you were sitting in Mr. Goldman's office did you tell him that Mr. Schwalberg said that this time he would have to put his bid in writing?

A. I did, sir.

Q. Did he just write this bid out on a piece of paper? Do you recall this (indicating)? It has been marked P-23. I will show it to you.

The Court: We will have a ten-minute recess.

(Recess 3:00 o'clock to 3:10 o'clock P. M.)

(5879)

The Court: Proceed.

By Mr. Sawyer:

Q. Mr. Minsky, let me ask you this first: At this meeting, were you accompanied by anyone from Paramount when you went to see Mr. Goldman?

A. Ulrik Smith.

Q. Now, at that time, just to review where we were, there had been a bid by the Trans-Lux which included $75,000 guarantee, at the time you went to see Mr. Goldman; is that right?

A. Yes, sir.

Q. And at that time there was also a written bid from the Viking Theatre and that bid offered 90 per cent over a house nut of $4900. Do you recall that?

A. If you say so.

Q. Do you accept that?

A. I accept it, yes, sir.

Q. You were sitting at Mr. Goldman's office and he wrote this bid. Did you have a chance to look at it? Is that the paper that he wrote out, the one that I just showed you before the recess?

A. Yes, sir.

Q. You have it there?

A. Right here (indicating).

(5880)

Q. And when he wrote that out didn't you think that it was incredible that he had matched the Trans-Lux bid to the penny in terms of guarantee? Did it strike you as amazing, Mr. Minsky, that he could do that?

A. No, sir, it did not.

Q. He didn't know from you what the Trans-Lux had offered in terms of a guarantee?

A. He did not, sir.

Q. And on top of that when he also bid 90 per cent above a house allowance of $5,000, that was almost identical to the Viking bid, wasn't it?

A. I don't know that it was identical. That is what he offered.

Q. Well, the Viking offered 90 per cent over $4900 a week, didn't they?

A. If you say so, yes, sir.

Q. So that he was just $100 different there from the Viking bid, right, in terms of the house allowance?

A. I wouldn't say that it was $100 difference from the Viking bid. I think the two bids were totally different.

Q. Well, the Viking bid was different with respect to guarantee, wasn't it?

A. I would like to look at the documents and then I think I can answer your question correctly, Mr. Sawyer.

(5881)

Q. Very well.

This is your transmittal, we don't seem to find the Viking bid. This is your transmittal of the Viking bid in which the 90/10 was offered. Will you read that photostat there?

A. I don't think I have such good eyes any more, Mr. Sawyer. I don't think I can see that.

Q. Doesn't that say—

A. I can read a portion of it but I don't know that I could read all of it.

"For each theatre--" it is pretty bad, isn't it?

Q. Doesn't it say "minimum guarantee $60,000 against 90/10, 90 per cent—"

A. The Viking Theatre offered a minimum.

Mr. Ward: Read it to yourself, I think Mr. Sawyer means, Mr. Minsky.

The Witness: I beg your pardon?

Mr. Sawyer: No, I meant read it aloud.

The Witness: "Minimum guarantee of $60,000—minimum guarantee against $60,000—minimum guar-

antee of $60,000 against 90/10, with an overhead of $4900 per week for house expense."

* * *

(5883)

Q. Isn't it true, Mr. Minsky, that with respect to the terms offered that the only difference that you see there between the Goldman bid that is written out and the Viking bid, that both of them, first of all, are 90 per cent deals, aren't they, over house allowance or house expense?

A. Yes, they both say that.

Q. Because isn't it true that the Viking's is $4900 and Goldman's is $5000?

A. Yes, Mr. Sawyer.

Mr. Ward: How about the guarantee?

By Mr. Sawyer:

Q. I am speaking now for the terms and the guarantee of the Viking was $60,000, right?

A. Yes, sir.

Q. And the guarantee offered by Goldman on this slip was $75,000?

A. Yes. However, there is a vast difference between the two offers.

Q. I will give you a chance to explain why there is a difference and how it was accepted.

The Court: I will permit him to do it now. He said, "Yes, but there is a vast difference."

Go ahead and explain what you mean by that.

(5884)

The Witness: One of the primary objectives, again, dating the COUNTRY GIRL in the City of Philadelphia was to pattern its opening around the Academy Award nominations which were, I believe, around the 12th of February, in that period, and we wanted to make certain that the picture which we

were absolutely sure of, as sure as one can be of winning an Academy Award because it had won the New York Critics' Award—it had opened in the Criterion Theatre in New York. So that we felt that the picture was certainly going to be nominated and hopefully would win the Academy Award. We, therefore, wanted the picture to open at that time. There was no stipulation of opening date on the Viking offer. They did not tell us when they were going to open the picture. We had no knowledge based on their offer or their bid here as to when the picture would open. It was of the utmost importance to the success of the picture, particularly in setting our campaign and following through in the territory.

Therefore, looking at the two offers there is a vast difference between the two of them when one was certain to open within the period of time that we were interested in and the other had no specific opening date; in addition to which one had more of a dollar guarantee than the other; in addition to which we felt the Midtown Theatre, operated in the manner in which it was operated, would give us a greater

(5885)

potential by reason of many factors that entered into the decision, and it was for that reason that I say that there is a wide difference between these two offers, Mr. Sawyer.

• • •

Q. My point is, Mr. Minsky, that at the time you sat in Mr. Goldman's office you state that you did not disclose to him any of the other bids; is that correct?

A. That is correct.

• • •

(5889)

Q. Now, when was it that the motion picture won the New York Critics' Award?

A. I do not know the exact date, Mr. Sawyer.

Q. Was it toward the end of 1954?

A. I do not know the exact date, Mr. Sawyer.

Q. Well, let me ask you this: When was it that Paramount assumed that the picture would be almost certain to win the Academy Award?

A. The first day we looked at it, Mr. Sawyer.

Q. And when was it that you assumed that on the basis of performance after the picture had critical acclaim?

(5890)

A. When we looked at the picture.

Q. I will put it to you this way, Mr. Minsky. Will you look at this document that has been marked—this document is initialled and it has been marked, it is the letter from Paramount Film Distributing Corporation.

(Document is shown to defense counsel)

Mr. Nizer: No objection.

(5891)

By Mr. Sawyer:

Q. Now, this letter is from Paramount to a number of exhibitors, is it not?

A. Yes, sir.

Q. And it is dated January 12, is it not?

A. Yes, sir.

Q. And it is written—if you will look at it, you can take your time to read it. Is it not written with the knowledge then that Grace Kelly had already received the New York Film Critics Award? It says so on the letter, doesn't it, Mr. Minsky?

A. I am reading the letter.

Q. All right.

A. It states that Grace Kelly has already been selected as the best actress of the year by the New York Film Critics.

Q. And doesn't the letter also state that the timing was to be arranged to coincide with it to get the maximum advantage out of the expectation that the Academy Award would be forthcoming?

A. Yes, sir.

Q. It says that, doesn't it?

A. Yes, sir.

Q. And doesn't that letter also say with that knowledge, that Paramount then had, that it is essential that the motion

(5892)

picture open between February 9th and 15th?

A. It states that the playing time is most important on this picture since we want this exhibition to commence—

Mr. Nizer: Can we hear that, please. I can't hear it. I would like to hear that.

A. (continuing) It states that—

"The playing time is most important on this picture, since we want the exhibition to commence between February 9th and 15th to tie in with the innovation this year of television and radiocasting covering pictures and artists nominated on February 12th for Academy awards."

By Mr. Sawyer:

Q. And then does it not again on the last paragraph state that—

"It is essential"—

am I quoting correctly?

"It is essential that the picture open between February 9th and 15th."

A. The letter so states.

Q. And when did Mr. Goldman open the picture?

A. I don't know the opening date at the moment. I am sure you have the record there.

Q. February 1st. W as it February 1st?

A. February 1st, if you state so.

(5893)

Q. Now, in the awarding of this motion picture to the Midtown Theatre was the guarantee the deciding factor?

A. A guarantee is never a deciding factor.

Q. So that it wasn't in this case either.

A. It is never a deciding factor.

Q. Well, then I take it—

A. I think it is one of the components that goes into making the final decision.

Q. You would agree then it is not the deciding factor in the award of the COUNTRY GIRL?

A. Yes.

Q. And what was the deciding factor?

A. Well, there were many deciding factors. It was not a singular event, it was something—in the consideration of any bid, not only in Philadelphia but anywhere, the theatre, the management, the showmanship, the length of running time, the potential of film rental to be earned, the accessibility of the theater, the dollar guarantee, if a guarantee is so submitted, the terms of the percentage arrangement on the picture, and many other reasons and factors that go into finalizing a decision.

Q. Haven't you testified that primarily you relied on the Goldman performance record in awarding this picture? That was the primary reliance, was it not?

(5894)

A. I don't know that I said it was the primary reliance.

Q. Well, I read from your deposition on page 77 with respect to the picture COUNTRY GIRL:

"Q. Didn't you rely with Mr. Goldman, primarily not on guarantees, but on his performance record at his theater?

"A. Yes; however, his $75,000 guarantee is a lot of money, and there is quite a variable when you start talk-

ing about $22,500 and $30,000, and $22,500 as opposed to $40,000, and $22,500 as opposed to $75,000."

Now, isn't it correct then that you—

Mr. Ward: Is that—

Mr. Sawyer: I read the whole answer.

By Mr. Sawyer:

Q. (continuing) But isn't it correct that you answer "Yes" as to whether or not you didn't primarily rely on the performance record in making this award?

A. No, Mr. Sawyer, I don't construe it as such, sir. I feel that in accepting the guarantee of the picture as a consideration there were many other considerations as well.

Q. Well, what did you mean when you said "primarily?" Didn't you say "primarily" here in the answer to this question?

A. I said "primarily," if you read that I said "primarily," of course.

(5895)

Q. Well, I did.

"Q. Didn't you rely on Mr. Goldman, primarliy not on guarantees, but on his performance record at his theatres?"

The answer is, "Yes."

And that is qualified, as I said: "However, his $75,000 guarantee is a lot of money."

A. Yes, Mr. Sawyer, I said that.

Q. Now, at this point time, well, this was January, as we know, of 1955, was it not?

A. It was, sir.

Q. And prior to setting up the split in the summer of 1953 you hadn't any performance records at Mr. Goldman's theatres.

A. In Mr. Goldman's theaters?

Q. Yes.

A. I believe we had played pictures in Mr. Goldman's theatres.

Q. Well, but not for some time at least before that, the split was set up, isn't that correct?

A. I do not know if it is correct. If you state so then I would accept it.

Q. Well, let me ask you this way: In the time from that time the split was set up until the award of this picture had you had satisfactory performance on Paramount pictures in Mr. Goldman's theaters?

A. I would have to look at the record, Mr. Sawyer, and then I

(5896)

could answer your question much more in detail.

Q. Well, let us look at the record then. Didn't you have, Mr. Minsky, to your own knowledge, a series of Paramount motion pictures that preceded COUNTRY GIRL which were disappointments to Paramount, that were not successful engagements, isn't that true?

A. I don't recall specifically which pictures you are referring to.

Q. Well, you licensed to Mr. Goldman KNOCK ON WOOD, did you not?

A. Yes, sir, we did.

Q. And that was disappointing at the Midtown, wasn't it?

A. It was not as good a gross, as I recall, that we had hoped for.

Q. Well, it was disappointing, wasn't it? It was not a good engagement, isn't that correct?

A. I would like to look at the figures and then I think I can answer your question much better.

* * *

(5899)

Q. You did not have any performances then at the Midtown then to compare at the time of the award of COUNTRY GIRL, right? You didn't have any prior performance at the Midtown, is that correct?

A. If you so state.

Q. Your counsel so states.

A. Yes.

Q. Do you agree to that?

A. Yes.

Q. So that prior performance of Paramount product at the Midtown was not a factor, even primarily or otherwise, is that correct?

A. Mr. Sawyer, no, but we knew the grossing potential of the Midtown Theatre, as well as other theaters. It was our business to keep our awareness of the theaters' grossing possibilities, so that we knew what each theater was capable of grossing.

It was not difficult to get this information. The Variety publishes grosses of theaters, and we tried to know

(5900)

what was playing and we tried to study our market and to be knowledgeable of our market.

Q. I am speaking of the Midtown Theatre now. Can you tell me what motion pictures there prior to COUNTRY GIRL you in your judgment thought had turned in a gross which in your opinion was a high gross; what were some of these pictures that you speak of?

A. I cant tell you sitting here, Mr. Sawyer, but I knew then.

Q. Did you ever—

A. If I had the record I probably would be in a position to answer your question.

Q. And at this point had you compared the grosses at the Midtown with grosses at the Viking Theatre on comparable product?

A. I don't know that we had.

Q. Did you ever find any gross at the Midtown prior to COUNTRY GIRL of as high as $84,000, which the Viking grossed on STUDENT PRINCE?

A. We had no information on the Viking Theatre other than that that we were able to secure in the same manner that we had from the Midtown—

Q. All right then.

A. —and we felt in our opinion that the Viking Theatre was not capable of developing the same kind of gross.

(5901)

Q. And in doing so did you consider whether or not the Midtown had ever had a gross prior to the award of COUNTRY GIRL as high as $84,000?

A. The figure $84,000 never entered my mind at that point, sir.

Q. And did you see whether or not they had ever had any gross such as the Viking Theatre earned on LAST TIME I SAW PARIS, of $93,000?

A. I had no knowledge of $93,000 grosses.

Q. Well, then, how did you make any comparison, Mr. Minsky, if you had no knowledge of these grosses between the Midtown's ability to gross and that of the Viking?

A. Mr. Sawyer, I didn't say I had no knowledge of the grosses. I said I had no knowledge of the $93,000 figure.

Q. You mean you didn't know the exact figure?

A. I didn't know that they had grossed $93,000 on the particular picture to which you are making reference.

Q. Or $84,000 on STUDENT PRINCE.

A. I had no knowledge of $84,000. I had knowledge of the fact that the Viking Theatre had generally been playing Loew's pictures, and had been successfully and continually playing nothing but Loew's pictures during a long period of time.

Q. Now, whether or not they were Loew's or somebody else's, they weren't your pictures, were they?

A. They were not my pictures, but they were Loew's pictures

(5902)

continuously.

Q. And the Midtown hadn't played any of your pictures at this point either, had it?

A. I don't believe that they had at that point.

Q. All right, sir, that is what your counsel just stated.

Now, what I am asking you, Mr. Minsky, is: how did you compare the grossing potential of the Midtown as compared—I am only asking now about the Viking—as compared with the Viking, unless you looked at or had some knowledge of grosses at the Viking and some knowledge of grosses at the Midtown?

A. Are you referring again to COUNTRY GIRL, Mr. Sawyer?

Q. At the time you awarded COUNTRY GIRL.

A. You are speaking of COUNTRY GIRL?

Q. Yes, that is right, at the time you awarded it, we are talking about that award having gone to Goldman on the basis of performance at the Midtown, and I asked you what performance you based that on, and did you compare it with the performance of motion pictures at the Viking Theatre.

Did you understand the question?

A. Yes, I am waiting until you are through.

Q. All right, you go ahead.

Oh, thank you.

One of the points in the bid was the fact that

(5903)

the Viking Theatre on COUNTRY GIRL limited our bid, limited our opportunity to ten weeks, as I recall—

Q. No, I am sorry, Mr. Minsky—

A. —with an opportunity—

Q. I know that you can go into that or your counsel can.

A. I am trying to—

Q. I am asking you whether or not you compared in judging the grossing potential of the Midtown Theatre—you testified it was a factor in the award. Did you compare grosses at the Midtown Theatre with those at the Viking on comparable product in the period preceding the point at which you made this decision?

• • •

(5904)

The Witness: No, we did not compare those specific figures. However—

Mr. Sawyer: Very well.

The Court: Now, let him finish.

The Witness: However, as a very honest and practical matter, you know, Mr. Sawyer, that in the consideration of any bid, we think we are knowledgeable in our business to the extent of knowing difference between theaters, knowing gross potential, and being able to analyze a bid, particularly when one limits you to ten weeks and the other has an indefinite run.

We knew in the case of the COUNTRY GIRL that this was a picture that could go on and on. Added with the

(5905)

Academy Award its run could establish a new record.

We were completely aware of the Viking Theatre's presence, we knew its location, we knew the pictures it had played. We did not know the specific numbers to which you made reference, Mr. Sawyer, but we did have a knowledge of what the theater was grossing generally. In our considered business judg-

ment we made the decision to play the picture where it played, and apparently we were not wrong in our judgment when the picture grossed the kind of money that developed a film rental of better than $150,000.

By Mr. Sawyer:

Q. When you say that you knew the kind of grosses that the Viking had been obtaining, are you testifying that on comparable product they were obtaining grosses that were lower than those obtained at the Midtown in this prior period; is that your testimony?

A. No, that is not my testimony.

I was traveling a great deal at that time, Mr. Sawyer, and Mr. Ulrik Smith supplied me with a lot of information. He was the local manager. He was sitting right here on the ground floor. He had his finger on the pulse of the business in Philadelphia to a greater degree than I did and he gave me a lot of information pertinent to the Viking and other theaters.

(5906)

Q. Regardless of who gave it to you, Mr. Minsky, would you answer my question as to whether or not your testimony is that the Viking Theatre was grossing less than the Midtown in this period on comparable product. You don't assert that, do you, Mr. Minsky?

A. I don't assert, what, Mr. Sawyer?

Q. You don't make the assertion, do you, Mr. Minsky, that during the period we are speaking about, which is a period prior to your decision to award COUNTRY GIRL to the Midtown, the Viking Theatre was grossing less on comparable product than the Midtown Theatre?

A. I didn't know whether they were grossing less on comparable product or not.

Q. Oh, very well.

A. But I certainly did not make the decision on the COUNTRY GIRL, as you just stated, that decision was made in New York City.

Q. Well, all right, the decision was made in New York City, but you have testified here, have you not, on depositions, the factors on which that decision was made?

A. Yes, sir.

Q. Very well. So that as far as comparisons with the Viking, one of the factors was not that you had information that the Midtown Theatre was grossing better than the Viking, that was

(5907)

not one of the factors, was it?

A. That was not a factor.

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(5910)

Q. Now then, you awarded the motion picture COURT JESTER to the Midtown also, is that right, Mr. Minsky?

A. Yes, I believe it played the Midtown.

Q. And you are aware also of the fact that the Viking had bid on that picture?

A. If you so state.

Q. And then subsequent to that you adjusted the film rental on the picture COURT JESTER, did you not?

A. Yes, there was an adjustment on the picture.

Q. Even though the Viking had bid?

A. Yes, sir.

Q. Is it your view that it is all right to make an adjustment in a picture after it has played, to thus change the contract terms where others have bid on it?

A. It is not my view.

Q. You disagree with that policy on the part of Paramount?

A. I do.

Q. Was the decision to make that adjustment made here or in New York?

(5911)

A. That decision was made in New York, and the man who made the decision is presently deceased, Mr. Ted O'Shea.

Q. With respect to the BRIDGES OF TOKO-RI you are aware of the fact that the Viking bid on that motion picture?

A. Yes, sir.

Q. That bid being P-11. Now, did you accept or reject the Viking's bid?

A. I would like to look at the records to see whether it was accepted or rejected, Mr. Sawyer.

Q. Well, you know where it played, don't you, BRIDGES?

A. Sir?

Q. You know where BRIDGES OF TOKO-RI played, don't you, the motion picture?

A. I didn't know whether it was the first time around, whether it was accepted or rejected. That is the reason I asked the question.

Q. Ultimately, if it was first or second, it was rejected real soon, since it played at the Randolph Theatre, as a matter of fact.

A. It played the Randolph Theatre.

Q. Didn't you then, after the rejection of the bids, go to Mr. Goldman and negotiate that picture to him?

A. No, sir, we didn't.

Q. How did be obtain it?

(5912)

A. The picture was negotiated, but not subsequent to the exhibition of the picture.

Q. Oh, no, I didn't mean to imply that. I said subsequent to the rejection of these bids, or the Viking bid at any rate.

A. We did negotiate with Mr. Goldman and did sell the picture to the Randolph Theatre.

Mr. Rome: When you say "Mr. Goldman," do you mean William Goldman personally?

The Witness: I am sorry, I apologize. I meant we negotiated with Goldman Theatres. Mr. George Beattie was the film buyer.

By Mr. Sawyer:

Q. And you didn't give the Viking an opportunity to rebid or negotiate for that picture, did you?

A. We did.

Q. Do you have any document or anything indicating that?

A. As I recall, the initial bid on the picture, the initial offers on this picture,—and in that connection, in order to refresh my memory, may I see the documentation on that picture?

Q. Yes, what would you like to see?

A. I would like to see the documentation on the awarding of the picture.

Q. Well—

(5913)

A. I don't quite recall the play dates sitting here.

Q. All right. Now, P-11 is the Viking bid, is that right?

Mr. Nizer: You mean an offer, it says so on it.

Mr. Sawyer: Well, it is in writing, isn't it?

Mr. Nizer: Yes.

By Mr. Sawyer:

Q. Isn't it a writing on the letterhead of the Viking?

A. Yes.

Q. Addressed to Mr. Ulrik Smith of Paramount?

A. Yes, Mr. Sawyer.

Q Would you read it, please?

A. "Following is offer on 'BRIDGES AT TOKO-RI' for the Viking Theatre.

"Playing time: Minimum of five weeks or more.

"Terms: Guarantee of $22,500. First three weeks 50 per cent of gross, 40 per cent thereafter.

"Holdover figure: Should gross for the fourth week be $7,500 or more, the picture will be held for a sixth week, etc. for succeeding weeks until a gross of $7,500 or under is reached, at which time the engagement may be discontinued by giving seven days' notice in advance to that effect.

"Advertising to be discussed.

(5914)

"Sincerely,

"Herman Comer,
General Manager."

Q. Is there a notation on there written by someone at Paramount?

A. Yes, Mr. Sawyer, there is a notation, it is my notation.

Q. I was going to ask you that. It is your notation?

A. Yes, sir.

Q. What does it say?

A. I circled the $22,500 and I said it is "Too little value."

Q. And did you obtain any guarantee at all from the Goldman Theatre when it played there?

A. I also—no.

Q. All right.

A. I do not believe we did.

Q. Did you make another notation on that?

A. Yes, I was going to read it, Mr. Sawyer.

Q. Yes.

A. I wrote on the lower left-hand corner:

"Ulrik"—meaning Ulrik Smith.

"This offer should be rejected.

"(Signed) Howard."

Q. Very well. Now here I show you P-12 and P-13.

(5915)

P-12 and 13 are two license agreements with the Randolph Theatre for this motion picture, are they not—

A. Yes, sir.

Q. —with Paramount.

Now, did you have an understanding with Mr. Beattie at the time the first of those two contracts were signed, that the terms were to be less than 50 per cent?

A. No, sir. I had no such understanding.

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(5917)

Q. Now, there was a second contract signed for BRIDGES, was there not, Mr. Minsky?

A. Actually it was not a second contract, Mr. Sawyer. I would like to explain to you how this came about, if I may.

Q. All right, you do that.

A. We finally negotiated the BRIDGES OF TOKO-RI with the Goldman Theatre and we had a 50 per cent contract for the run of the picture to the best of our knowledge, because this was the conclusion that we felt we had reached.

George Beattie representing Goldman Theatres felt all along that he had not agreed to this. In the meantime the picture had opened. George had maintained that the picture should play on a sliding scale, which he continually argued the theatre by its developing potential was capable of developing to our satisfaction, so that Paramount on this picture were we to play it on the sliding scale would earn a sizable film rental. He was agreeable to playing the picture at 50 per cent for the first week and he wanted the picture to play on the sliding scale thereafter.

We did not agree to this. When our contract was on Beattie's desk he did not sign our contract. In the meantime the picture had been playing and according to Price Waterhouse, who was the auditing firm handling Paramount

(5918)

pictures, Paramount must bill the dollars based on the contract in the manner in which the picture is billed. Should there be any difference or modification of contract terms then we must use what they consider a reduction form, an adjustment form. We have a name for it, 2863, in our company. We must conform with this accounting procedure.

When we finally went back and agreed with Beattie to accept his scale, the first week of the picture had played, and I believe I am correct in this—my time may be off—but we had developed more than 50 per cent on the first week, meaning that the first week gross on this picture was so high that we received 50 per cent of the gross whether it was on a scale or whether it was a firm deal.

The succeeding weeks did not earn 50 per cent and therefore in accordance with the agreement which we finally accepted with Beattie, which was the result of much discussion and with the approval of our home office, we put through this modification of contract in accordance with our sound accounting procedure. This was the reason why there were two different contracts, one listed at 50 per cent which Beattie kept and the other with a change of contract with Paramount had.

Q. Does this P-13 represent the change that was made adopting this scale, as you say? A scale was adopted instead of a

(5919)

straight 50 per cent, is that correct?

A. A scale for the weeks beyond the first week.

Q. You say that was because the first week had it been on scale would have earned more than 50 per cent?

A. I think it would have earned not more but—

Q. It couldn't earn more, could it?

A. —it would have earned 50 per cent.

Q. It couldn't earn more, could it, because the scale only goes up to 50 per cent?

A. That is what I said, Mr. Sawyer.

Q. All right. Now, under any circumstances when the scale was put in as opposed to the straight 50 per cent terms, Paramount could never possibly get more than 50 per cent because the scale doesn't go up higher than 50 per cent, does it?

A. That is right, Mr. Sawyer.

Q. So that the net result of all of this, no matter how you explain it, is that the terms that the Goldman Theatres, the Randolph Theatre was obligated to pay were reduced, were they not?

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(5920)

A. Paramount did receive less than if the first contract had been in. However, Mr. Sawyer,—

Q. Very well.

Mr. Ward: Let him finish.

A. I do not consider—

The Court: Go ahead.

Mr. Ward: Go ahead, Mr. Minsky.

A. I do not consider this in any way an adjustment or a reduction or a credit.

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(5921)

Q. If the contract wasn't signed, Mr. Minsky, then it wasn't a contract at all, was it? If it wasn't signed by

Mr. Beattie, is that your testimony, that it wasn't signed?

A. My testimony, Mr. Sawyer, is to the effect that we had a confliction of opinion and there was an elongated discussion at which time Mr. Beattie finally signed an agreed-upon-contract. However, I would like to point something else out to you, Mr. Sawyer, if I may.

Q. All right, you may just—

The Court: Let him proceed. Go ahead.

(5922)

A. We were fully knowledgeable at the time of this negotiation that the Viking Theatre could have never played this picture at that time.

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A. Mr. Sawyer, we knew that we couldn't play the Viking Theatre under any circumstances at the time that we wanted to play this picture and that was the reason we pursued our negotiations so vigorously, because we wanted to open this picture as quickly as we could because of the conflict in cast between COUNTRY GIRL and TOKO-RI. Both pictures had Grace Kelly and William Holden. We couldn't play both

(5923)

pictures concurrently in downtown Philadelphia. It was important, therefore, that one precede the other.

We knew that the Viking Theatre had an outside picture purchased because the man that had sold them the picture had left everyone on the street know that he had sold a picture to the Viking Theatre for a firm guarantee that was very big to him and he was terribly excited and elated over this kind of a deal. He therefore had the picture firmly committed. And Mr. Smith, Mr. Ulrik Smith, our branch manager, told me of this and told me of the common knowledge that was up and down I choose to call it the street, meaning film row, where all the men had

luncheon. Therefore, we knew we couldn't possibly play the Viking Theatre, hence we pursued our negotiation and as it turned out we were very happy with the engagement at the Randolph Theatre.

By Mr. Sawyer:

Q. And as a result of all that, Mr. Minsky, Paramount accepted from the Randolph Theatre in full payment for this engagement over $5,000 less than the original contract had bound the William Goldman Theatres to pay, is that right?

Mr. Ward: Just a minute. I have to make the objection all over again, sir. My friend persists in his erroneous construction of what the witness has said. There was not obligation on the theatre to pay 50 per cent. The

(5924)

witness had made it clear.

By the Court:

Q. Wasn't that in the original agreement which was changed?

A. Your Honor, there was a confliction. Mr. Beattie said he never made the agreement. We maintained he had. We finally sat down and discussed it. We argued; we argued at length, Your Honor, and finally in our best interest, mutually best interest, because we wanted the picture to develop the greatest possible gross, we wanted the picture to play and subsequently resolved the argument. But there was only one contract. In order to change in our intracompany billing procedure we had to put through what was this 2863.

The Court: Well, I think from what the witness has said, Mr. Sawyer, that there just was no contract. I mean, if there was a disagreement as to the—

Mr. Sawyer: I understood the witness to say a minute ago that Mr. Beattie signed the first contract and then—

Mr. Ward: I think you misunderstood him then.

Mr. Sawyer:—21 days later P-13 was instituted.

Mr. Nizer: That is an application.

By the Court:

Q. Well, did Mr. Beattie sign a contract which was changed?

(5925)

Mr. Nizer: That is an application for a contract.

A. Sir?

By the Court:

Q. Did Mr. Beattie sign a contract with you the terms of which were changed?

A. I don't believe Mr. Beattie signed the contract until the terms were changed, to the best of my knowledge, Your Honor.

By Mr. Sawyer:

Q. Well, now, I show you P-12 and ask you if this isn't the contract for the exhibition of the motion picture BRIDGES OF TOKO-RI between Paramount Film Corporation and the William Goldman Theatres. Is that what this P-12 is?

A. No, sir, this is not a contract.

Q. Why isn't it?

A. This is an exhibitor's copy of an application for contract.

Mr. Nizer: That's right.

A. An exhibitor retains this copy when he signs an application. This is what he retains, and until such time

as he receives an executed copy of a contract from our home office it is not a contract.

Mr. Nizer: That's right.

(5926)

A. Therefore, this is an application for contract and not an executed contract.

By Mr. Sawyer:

Q. But it is signed, is it not, or initialed by George Beattie?

A. It is initialed.

Q. Well, let's just get on that point.. You would agree, would you not, that the initials would be just as binding as the full signature?

A. I would, Mr. Sawyer.

Q. Now, in whose possession then did that application rest? Didn't it go to Paramount?

A. This always is retained in the possession of the Goldman Theatres.

Q. Didn't Paramount get a copy also initialed?

A. No, sir. This was not signed to the best of my knowledge until such time as we finally agreed on the terms, and then we had to change the contract.

Q. Well, why was it signed then at that time if these terms were not the ones that were put into effect?

Mr. Ward: Objected to, If Your Honor please. The question as put to the witness with respect to a document that the witness said was always in Goldman's possession and which bears the initials of another man, Mr. Beattie.

(5927)

Mr. Rome: And Mr. Beattie has testified about it, sir.

The Court: But did you have that? Did you get that?

The Witness: No.

Mr. Ward: No.

The Court: Well, he didn't get it. He wouldn't know about it.

By Mr. Sawyer:

Q. Do you know that Mr. Beattie testified he did sign the first contract?

A. I don't know what Mr. Beattie's testimony was.

Mr. Ward: It is an application, Mr. Sawyer, as the witness has referred to it.

Mr. Sawyer: Now I would like to ask for Paramount's copy, then, of P-12.

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